



UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW
LIBRARY

Faculty Library



Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

REPORTS

OF

J. B. Smith 515
CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DURING THE

JANUARY TERM, 1856.

BY J. W. SHEPHERD,
STATE REPORTER.

40588
VOL. XXVIII.

MONTGOMERY:
BARRETT & WIMBISH, PRINTERS.
1856.

REPORT

[Handwritten signature]

KFA
45
A2
v. 28
Gp 2

~~FL~~
~~\$~~
~~A/E 70~~
~~AL~~

2288
VOL. XXVIII

MONTGOMERY
LIBRARY
1936

OFFICERS OF THE SUPREME COURT, DURING THE TIME OF THESE DECISIONS.

UNTIL THE 2D JANUARY, 1856.

HON. WM. P. CHILTON, CHIEF JUSTICE.

HON. GEORGE GOLDTHWAITE, }
HON. SAMUEL F. RICE, } Associate Justices.

FROM THE 2D TO THE 15TH JANUARY.

HON. GEORGE GOLDTHWAITE, CHIEF JUSTICE.

HON. SAMUEL F. RICE, }
HON. A. J. WALKER,* } Associate Justices.

AFTER THE 15TH JANUARY.

HON. SAMUEL F. RICE, CHIEF JUSTICE.

HON. A. J. WALKER, }
HON. GEO. W. STONE,† } Associate Justices.

M. A. BALDWIN, ATTORNEY GENERAL.

JOHN D. PHELAN, CLERK.

JAMES S. ALBRIGHT, MARSHAL.

* Elected by the legislature to fill the vacancy caused by the resignation of Hon. Wm. P. Chilton.

† Elected by the legislature to fill the vacancy caused by the resignation of Hon. Geo. Goldthwaite.

OFFICE OF THE ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

THE WASHINGTON POST
THE GEORGETOWN NEWS
THE ANNAPOLIS NEWS

THE BALTIMORE NEWS

THE PHILADELPHIA NEWS

THE PITTSBURGH NEWS

THE CINCINNATI NEWS

THE CLEVELAND NEWS

THE DETROIT NEWS

THE INDIANAPOLIS NEWS

THE KANSAS CITY NEWS

THE LOUISVILLE NEWS

THE MEMPHIS NEWS

THE MILWAUKEE NEWS

THE MINNEAPOLIS NEWS

THE OMAHA NEWS

THE PORTLAND NEWS

THE RICHMOND NEWS

THE ST. LOUIS NEWS

THE ST. PAUL NEWS

THE TAMPA NEWS

THE WASHINGTON POST

THE GEORGETOWN NEWS

THE ANNAPOLIS NEWS

TABLE OF CASES.

Abernathy & Hanna v. Benham (Kirkman),.....	501	Commissioners of Pilotage of Mobile Bay v. Steamboats Cuba, Swan, and J. H. Bell,.....	185
Acre and Johnson v. Hunt and Frowner,.....	580	Cook v. Cook,.....	660
Albertson, Douglass & Co. v. Goldsby,.....	711	Corley v. The State,.....	22
Allen & Gill (Turner v. Stetts),..	420	Cullom & Co. (Mastin v.),.....	670
Andrews v. Andrews,.....	432	Cunningham (Dew v.),.....	466
Arrington (Livingston v.),.....	424	Daily v. Burke,.....	328
Askew v. Hooper,.....	634	Danforth v. Laney,.....	274
Avery v. Hair,.....	267	Dawson (Doe d. Saltonstall and Wife v. Riley &),.....	164
Baker v. Gregory and Wife,.....	544	Deslonde and James v. Carter,...	541
Bank at Montgomery (McKenzie v. Branch),.....	606	Dew v. Cunningham,.....	466
Banks, <i>Ex parte</i> ,.....	28	Doe d. Saltonstall and Wife v. Riley & Dawson,.....	164
Banks, <i>Ex parte</i> ,.....	89	Dorman's Exe'trix v. Richardson,	679
Barlow v. Lambert,.....	704	Douglass & Co. v. Goldsby (Albertson),.....	711
Barnes (Williams v.),.....	613	Drake v. Foster,.....	649
Beeson v. Wiley, Banks & Co.,...	575	Dumas v. Hunter,.....	688
Benham (Kirkman, Abernathy & Hanna v.),.....	501	Dunham v. Roberts,.....	286
Bettis v. Saint,.....	214	Dunlap v. Robinson,.....	100
Bice (Palmer v.),.....	430	Echols (Owens v.),.....	689
Boullemet v. The State,.....	83	Elmore v. Mustin,.....	309
Boykin v. Rain,.....	332	<i>Ex parte</i> Banks,.....	28
Brady v. O'Reilly's Adm'r,.....	530	<i>Ex parte</i> Banks,.....	89
Bransford (Wells v.),.....	200	<i>Ex parte</i> Cole,.....	50
Bumgardner v. Taylor,.....	687	Fenner (Walker v.),.....	367
Burke (Daily v.),.....	328	Field's Heirs v. Goldsby,.....	218
Burleson (Gillespie's Adm'r v.),..	551	Flinn (The State v. Martin and),..	71
Burnham (Kern v.),.....	428	Foster (Drake v.),.....	649
Cadenhead (Willis v.),.....	472	Foust v. Yielding,.....	658
Carroll v. Malone,.....	521	Franklin v. The State,.....	9
Carter (Deslonde and James v.),..	541	Frowner (Acre and Johnson v. Hunt and),.....	580
Cater (Jesse v.),.....	475	Gillespie (Price & Simpson v.),..	279
Causey (Smith v.),.....	655	Gillespie's Adm'r v. Burleson,...	551
Christian (Thompson's Adm'r v.),	390	Gill (Turner v. Stetts, Allen &),..	420
Clark v. Gilmer,.....	265	Gilmer (Clark v.),.....	265
Cockrell (Hall v.),.....	507	Gliddon v. McKinstry,.....	408
Cole, <i>Ex parte</i> ,.....	50		

Godden v. LeGrand,.....	158	Laney (Danforth v.),.....	274
Goldsby (Albertson, Douglass & Co. v.),.....	711	Lawler v. Norris,.....	675
Goldsby (Field's Heirs v.),.....	218	Lea (Thompson v.),.....	453
Grady v. Robinson,.....	289	LeGrand (Godden v.),.....	158
Grant & Nickels (Stodder v.),.....	416	Little (Hair v.),.....	236
Gregory and Wife (Baker v.),.....	544	Little (Russell v.),.....	160
Gresham v. Tucker,.....	611	Livingston v. Arrington.....	424
Gunter (Williams and Wife v.),.....	681	Livingston (Harris v. Intendant and Council of),.....	577
Hair v. Avery,.....	267	Machem v. Machem,.....	374
Hair v. Little,.....	236	Maddox (Pollard v.),.....	321
Hall v. Cockrell,.....	507	Malone (Carroll v.),.....	521
Hamner (Patton v.),.....	618	Martin & Flinn v. The State,.....	71
Hanna v. Benham (Kirkman, Abernathy &),.....	501	Master v. Cullom & Co.,.....	670
Harris v. Intendant and Council of Livingston,.....	577	May's Heirs v. May's Adm'r,.....	141
Harvey and Wife v. Thorpe,.....	250	Mays v. King,.....	690
Hatton v. Landman,.....	127	McCartney (Pearsall v.),.....	110
Henderson v. Segars,.....	352	McHenry v. Wells,.....	451
Hendrix (West and Wife v.),.....	226	McKenzie v. Branch Bank at Montgomery,.....	606
Henry v. Jones,.....	385	McKenzie (Keils & Sylvester v. Pratt &),.....	390
Hooper v. Askew,.....	634	McKinstry (Gliddon v.),.....	408
Houseman v. Stewart,.....	684	Memphis & Charleston Railroad Co. (Woosley v.),.....	536
Huffman v. The State,.....	48	Mills (Nunn v.),.....	600
Hunt and Frowner v. Acre and Johnson,.....	580	Morrison and Wife (Travis v.),.....	494
Hunter (Dumas v.),.....	688	Mustin (Elmore v.),.....	309
Intendant and Council of Livingston (Harris v.),.....	577	Nelson (Stanley v.),.....	514
Irons v. Reynolds,.....	305	Nelson (Wallace v.),.....	282
Isley & Co. (Simmons v. Waldron,).....	629	Newberry's Adm'r v. Newberry's Distributees.....	691
Ivey's Adm'r v. Owens and Wife,.....	641	Nickels (Stodder v. Grant &),.....	416
Jackson v. Shipman,.....	488	Norris (Lawler v.),.....	675
James (Carter v. Deslonde &),.....	541	Nunn v. Mills,.....	600
Jesse v. Cater,.....	475	Ogletree v. The State,.....	693
Johnson (Hunt and Frowner v. Acre and),.....	580	O'Reilly's Adm'r v. Brady,.....	530
Jones (Henry v.),.....	385	Owens v. Echols,.....	689
Jones v. Sterns,.....	677	Owens v. White,.....	413
Keils & Sylvester (Pratt & McKenzie v.),.....	390	Owens and Wife (Ivey's Adm'r v.).....	641
Kern v. Burnham,.....	428	Palmer v. Bice,.....	430
King v. King,.....	315	Patton v. Hamner,.....	618
King (Mays v.),.....	690	Pearsall v. McCartney,.....	110
King v. Pope,.....	601	Pollard v. Maddox,.....	321
Kirkman, Abernathy & Hanna v. Benham,.....	501	Pollard v. Scaers' Adm'r.....	484
Lambert (Barlow v.),.....	704	Pope (King v.),.....	601
Landman (Hatton v.),.....	127	Pratt & McKenzie v. Keils & Sylvester,.....	390
		Price & Simpson v. Gillespie,.....	279
		Railroad Co. (Woosley v. M. & C.).....	536

TABLE OF CASES.

7

Rain (Boykin v.),.....	332	State (Thompson v.),.....	12
Rawdon v. Rawdon,.....	565	State (Ward v.),.....	58
Reynolds (Iróns v.),.....	305	Steamboats Cuba, Swan, and J. H.	
Richardson v. Dorman's Exe'trix, 679		Bell (Commissioners of Pilot-	
Riley and Dawson (Doe d. Salton-		age v.),.....	185
stall and Wife v.),.....	164	Sterns (Jones v.),.....	677
Roberts (Dunham v.),.....	286	Stetts, Allen & Gill (Turner v.)..	420
Robinson (Dunlap v.),.....	100	Stewart (Houseman v.),.....	684
Robinson (Grady v.),.....	289	Stodder v. Grant & Nickels,....	416
Russell v. Little,.....	160	Sweeney v. The State.....	47
Saint (Bettis v.),.....	214	Sylvester (Pratt & McKenzie v.	
Salomon v. The State,.....	83	Keils &),.....	390
Saltonstall and Wife (Riley and		Taylor (Bumgardner v.),.....	687
Dawson v. Doe d.),.....	164	Thompson v. Lea.....	453
Satterwhite v. The State,.....	65	Thompson v. The State.....	12
Secars' Adm'r (Pollard v.),.....	484	Thompson's Adm'r v. Christian,..	399
Segars (Henderson v.),.....	352	Thorpe (Harvey and Wife v.),....	250
Shaw v. White,.....	637	Travis v. Morrison and Wife,....	494
Sheppard (Wilson v.),.....	623	Tucker (Gresham v.),.....	611
Shipman (Jackson v.),.....	488	Turner v. Stetts, Allen & Gill,...	420
Shorter v. Urquhart,.....	360	Urquhart (Shorter v.),.....	360
Simmons (Waldron, Isley & Co. v.) 629		Waldron, Isley & Co. v. Simmons, 629	
Simpson v. Gillespie (Price &),... 279		Walker v. Fenner,.....	367
Smith v. Causey,.....	655	Walker and Wife v. Smith,.....	569
Smith (Walker and Wife v.),..... 569		Wallace v. Nelson,.....	282
Stalls v. The State,.....	25	Ward v. The State,.....	53
Stanley v. Nelson,.....	514	Wells v. Bransford,.....	200
State (Boullemet v.),.....	83	Wells (McHenry v.),.....	451
State (Corley v.),.....	22	West and Wife v. Hendrix,....	226
State (Flinn & Martin v.),.....	71	White (Owens v.),.....	413
State (Franklin v.),.....	9	White (Shaw v.),.....	637
State (Huffman v.),.....	48	Wiley, Banks & Co. (Beeson v.),..	575
State (Martin & Flinn v.),.....	71	Williams v. Barnes,.....	613
State (Ogletree v.),.....	693	Williams and Wife v. Gunter,....	681
State (Salomon v.),.....	83	Willis v. Cadenhead,.....	472
State (Satterwhite v.),.....	65	Wilson v. Sheppard,.....	623
State (Stalls v.),.....	25	Woosley v. M. & C. Railroad Co.,	536
State (Sweeney v.),.....	47	Yielding (Foust v.),.....	658

RULE RESPECTING BRIEFS IN SUPREME COURT,

ADOPTED AT JANUARY TERM, 1856.

RULE 32. The counsel for the appellant, or plaintiff in error, in each case, shall furnish to the Court a Brief, containing a statement of the points to be decided, and of the facts of the case so far as necessary to show the manner in which these points arise; and the counsel for the appellee, or defendant in error, in like manner, shall furnish a Brief, setting forth the points of his defense. All Briefs must be furnished at least one day before the argument of the cause; and any counsel, failing to furnish a Brief as aforesaid, shall not be heard in argument at the bar.

Rule 16, on page 711 of the Code of Alabama, and Rule 30, adopted January Term, 1854, are hereby declared to be superseded.

RULE OF CHANCERY PRACTICE,

ADOPTED AT JANUARY TERM, 1856.

Ordered by the Court, that the 4th Rule for the regulation of the Practice in Chancery, adopted at the June Term of this Court, 1854, be amended, by adding to it the following: 'Provided, that this Rule shall not apply to orders for the issuing of writs of *ne exeat* and equitable attachments, and for the sale of personal property levied on, in the granting of which the Register shall not be restricted to Monday.'

RULE OF PRACTICE IN CIRCUIT COURTS,

ADOPTED AT JANUARY TERM, 1853.

Ordered by the Court, that the following Rule of Practice, for the Inferior and Circuit Courts of this State, be, and the same is hereby adopted—to-wit:

When an action is brought, under section 2129 of the Code, by any transferee, assignee, or endorsee, the plaintiff shall not be required to prove his interest in the cause of action, unless the same is put in issue by plea, verified by affidavit.

REPORTS

OF

CASES ARGUED AND DETERMINED

At January Term, 1856.

FRANKLIN *vs.* THE STATE.

[INDICTMENT FOR MURDER.]

1. *Admissibility of confessions of guilt.*—Confessions of guilt voluntarily made by the defendant after he was arrested, and whilst his hands and feet were tied, are admissible evidence against him.
2. *Power of court over proceedings in fieri.*—Where the trial and conviction occur at the term at which the indictment was found, the court may, at any time during that term, as well after as before conviction, cause the clerk to endorse the indictment "filed," to date the endorsement according to the fact, and sign it; and may also cause an entry to be made on the minutes, that the indictment was returned into court by the grand jury, with the day on which it was so returned. Over such matters the court has control during the term, and may alter, amend, or set them aside, as justice may require.

FROM the Circuit Court of Walker.

Tried before the Hon. THOS. A. WALKER.

The record shows that on the 24th day of September, 1855, the grand jury, after being duly organized at the Fall term, 1855, of the circuit court of Walker county, returned into that court an indictment, charging the plaintiff in error, in

due form, with the murder of Absalom Boon; that, at the time it was so returned into court, it was endorsed "a true bill", and the endorsement was signed by "James L. Boyd, foreman of the grand jury"; that, on the same day, the clerk of that court entered on it the following endorsement: "Filed in open court by James L. Boyd, foreman of the grand jury, Sept. 24th, 1855. Test: D. L. Stovall, Clerk;" that, at that time, the plaintiff in error was confined in the jail of Tuskaloosa county for safe keeping; that on the same day, the court caused to be entered on the minutes a statement that said indictment had been returned into court, and an order thereupon that the jailor of Tuskaloosa county deliver the plaintiff in error to the sheriff of Walker county, or to his deputy, and that said sheriff, or his deputy, bring the plaintiff in error before that court; and that on the 28th day of September, 1855, the plaintiff in error pleaded not guilty, and was tried under said indictment, and the jury found him guilty of murder in the first degree, and further found that he "must suffer death."

On the trial, as appears by the bill of exceptions, the State introduced Wm. E. Payne as a witness, who stated, that after the prisoner was arrested, and his hands tied with a rope, and his feet with a bridle, he (the prisoner), voluntarily and of his own accord, confessed as follows: "I took damned good aim, for I intended to kill him." "I have not killed man, but only a damned dog—I aimed right at his heart." "I killed him, and am glad of it." The witness stated, that "these words were voluntarily spoken by the prisoner, without threat or promise, or any questions being asked him, but under duress as above—as above stated, being arrested and tied." To the introduction of this testimony the prisoner objected; but his objection was overruled, and he excepted.

After the trial, the prisoner made a motion in arrest of judgment. The grounds of this motion, and the action of the court in relation thereto, are stated in another bill of exceptions, sealed at his instance. The first ground of the motion was, "that there was no sufficient endorsement by the clerk that said indictment was returned into court by the grand jury." The court held this ground insufficient, and permitted the clerk, after verdict, to make the following en-

dorsement on the indictment, which (the bill of exceptions states) "was according to the facts," viz:

"Filed in open court, Sept. 24, 1855.

D. L. STOVALL, Clerk."

The bill of exceptions contains this additional statement: "The indictment in this cause was found at this term of the court now in session, and returned into open court by the grand jury empaneled and sworn at this term of the court. The court directs the clerk to make the proper endorsement as above stated, and defendant excepted."

The only other ground of the motion in arrest of judgment was, "that there were no sufficient minutes of the court showing that said indictment was returned into court by the grand jury. The entry objected to in this behalf is in the following words, to-wit:

"The State,
v. } Murder.
Lott M. Franklin.

} This day the grand jury, now
} in session for Walker county,
} returned into open court a bill
of indictment against Lott M. Franklin, for murder. And
it appearing to the court that the said Lott M. Franklin is
confined in the jail of Tuskaloosa county for safe keeping, it
is therefore ordered by the court, that an order be made re-
quiring the jailor of Tuskaloosa county to deliver the said
Lott M. Franklin to the sheriff, or his deputy, of this (Walker)
county, and that the said sheriff, or his deputy, shall forth-
with proceed to execute this order and bring the said Frank-
lin before this court."

After stating the foregoing matters, the bill of exceptions further states, that the court overruled the motion in arrest of judgment, and the defendant excepted.

Sentence of death was pronounced and entered against the prisoner; but, as questions of law had been reserved by bill of exceptions, the execution of the sentence was suspended for at least sixty days after the commencement of the present term of this court, and the prisoner removed to the jail of Tuskaloosa county, there to be kept and detained until the further order of this court.

WM. S. EARNEST, for the appellant.

M. A. BALDWIN, Attorney General, *contra*.

RICE, C. J.—Confessions of guilt, voluntarily made by a person, are admissible evidence against him, although they were made after he was arrested, and whilst his hands were tied with a rope and his feet with a bridle.—*Seaborn v. The State*, 20 Ala. R. 15 ; *Brister v. The State*, 26 Ala. R. 107.

Where the trial and conviction occur at the term at which the indictment was found, the court may, at any time during that term, as well after as before the conviction, cause its clerk to endorse on the indictment, "filed," and to date such endorsement according to the fact, and to sign it ; and may also cause an entry to be made on the minutes, that the indictment was returned into court by the grand jury, and the day on which it was so returned into court. Over such matters the court has control during the term, and may alter, amend, or set them aside, as justice may require.—*Saunders v. Coffin*, 16 Ala. R. 421.

These plain principles dispose of the present case, and force us to the conclusion that there is no error which can avail the prisoner.

The judgment is affirmed ; and as the sentence of conviction has been suspended that the case might be here reviewed, it is adjudged that the prisoner be executed by the sheriff of Walker county, in the manner prescribed by law, on Friday, the 21st day of March, 1856, between the hours of 10 o'clock, A. M., and 4 o'clock, P. M., of that day, by being hanged by the neck until he is dead. And the jailer of Tuskaloosa county must deliver the prisoner to the sheriff of Walker county, on demand made by said sheriff ; who must execute this sentence in Walker county.

THOMPSON vs. THE STATE.

[INDICTMENT FOR POLYGAMY.]

1. *Dissolubility of marriage contract*.—The English doctrine, that the dissolubility of the marriage contract depends upon the law of the country in which it

- was solemnized, is founded on the doctrine of perpetual allegiance, is therefore inconsistent with the spirit of our institutions, and is here repudiated.
2. *Jurisdiction of courts of husband's domicile to grant divorce.*—The husband has a right to emigrate and acquire a new domicile, and thereby acquires, as a consequence, the right of having his matrimonial status controlled by the laws and judicial tribunals of the country of his new domicile, although his wife remains in the State which he left.
 3. *Validity of foreign decree of divorce rendered on publication.*—The general principle, that judgments and decrees, when set up in a different State from that in which they were rendered, may be avoided, when the court had no jurisdiction of the defendant's person and there was no appearance, does not apply to decrees of divorce rendered on publication against non-resident defendants, the validity of which depends on the statutes of the State in which they were rendered, and results necessarily from the existence of the jurisdiction.
 4. *Arkansas statutes on subject of divorce construed.*—Under the statutes of Arkansas, as shown in evidence in this case, the fact that the cause of divorce commenced and existed out of that State, and was not continued or completed there, would not render void a decree there obtained by a husband who had resided an entire year in that State.
 5. *What would render void foreign decree of divorce.*—A decree of divorce obtained in Arkansas, by a person domiciled in Alabama, would be void, and would constitute no defence to a prosecution in Alabama for polygamy, if the decree was procured by fraud, or if the defendant did not go to Arkansas *animo manendi*, or if he went thither merely for the purpose of obtaining a divorce, and with the intention of remaining no longer than was necessary to accomplish that purpose.

FROM the Circuit Court of Marion.

Tried before the Hon. THOS. A. WALKER.

INDICTMENT for polygamy, charging "that Allen Thompson, before the finding of this indictment, having a wife then living, unlawfully married one Roxanna Wilkerson, against the peace and dignity of the State of Alabama." The defendant excepted to the charge of the court, under which he was convicted, and which is the only matter now assigned for error. All the material facts of the case are stated in the opinion of the court.

WM. S. EARNEST, for the appellant, submitted the case without brief or argument.

M. A. BALDWIN, Attorney General, *contra*, contended that the decree of divorce, on which the defence was rested, and which was rendered in Arkansas, on publication against a

non-resident defendant, was void for want of jurisdiction, and therefore constituted no defence to this prosecution; and cited the following cases: Hanover v. Turner, 14 Mass. 227; Barber v. Root, 10 *ib.* 262; Borden v. Fitch, 15 Johns. 121; Vischer v. Vischer, 12 Barb. (S. C.) R. 60; Harrison v. Harrison, 19 Ala. 504; Harrison & Saunders v. Harrison, 20 *ib.* 630.

WALKER, J.—The appellant was convicted of polygamy, and sentenced to the penitentiary for two years. The material facts in the case, as set forth in the bill of exceptions, are to the following effect: The appellant was married, in the State of Alabama, in 1838, and in 1848 or 1849 left his wife and two youngest children in an adjoining county in Mississippi, and left; but returned to Mississippi, and sold out a portion of his property, left some, and carried the remainder with him into Arkansas, where he settled and cultivated a farm. It is inferrible from the bill of exceptions, that his emigration to Arkansas was in 1848 or 1849. When the husband left, the wife went to her father's in Marion county, in this State, and has since resided there. In February, 1853, the appellant returned to Marion county, in Alabama, and married another woman, his wife still living. The defence of the prosecution was based upon a decree for divorce *a vinculo matrimonii*, rendered by the circuit court of Jackson county, in the State of Arkansas, on the 28th May, 1851. The record of the divorce suit shows, that the wife was a defendant; that she was proceeded against as a non-resident by publication in a newspaper; that the publication was duly made; that the application for divorce was predicated upon an alleged abandonment of the applicant in the State of Mississippi, which abandonment continued for one year while he was a citizen of that State; and also upon the further allegation that he had been a resident of the State of Arkansas for one year next preceding the petition, and that his wife had voluntarily absented herself from his bed and board for the space of two years preceding the application. The decree recites that the publication and non-residence of the wife were shown; and that it appeared from the bill, which is sworn to, that the husband had been a resident for one year

preceding the suit, and that the defendant had left his bed and board for two years without cause, he having performed all the duties of a husband. Thereupon a divorce *a vinculo matrimonii* is decreed. There was also a decree *pro confesso*, antecedent to the decree final, against the defendant, upon proof of the publication and non-residence.

Extracts from the constitution and laws of the State of Arkansas were read ; and it was proved that the appellant's first wife had never been in the State of Arkansas, and had no notice of, and made no defence to, the proceedings for a divorce there.

The above is substantially the proof set out in the bill of exceptions, but it does not appear whether there was other proof in the case or not.

The court gave a charge to the jury in the following words : " If the jury believe from the evidence that the defendant was married to Gracy D. Smith in Alabama, and removed to an adjoining county in Mississippi, and, while living in Mississippi, left his family, and went to the State of Arkansas, and there resided one year, and then instituted a suit in Arkansas for divorce against his wife, who never resided in Arkansas, and never had personal notice of the exhibition of the suit ; and further believe from the evidence that the cause of divorce commenced and existed beyond the State of Arkansas, and never was continued or completed within the State, then the divorce obtained by the defendant in the State of Arkansas was invalid and void, being in *fraudem legis* of the State where the parties were married and had their domicile."

This charge was excepted to, and the entire case in this court depends upon the question of its correctness. It asserts that the invalidity of the *Arkansas* divorce would result from several concurring circumstances. If any one or more of those circumstances was conclusive against the validity of the decree, the charge was not erroneous. The defendant could not complain that the court had, by adding unnecessary conditions, increased the difficulty of proving that the divorce was void. It therefore becomes our duty, to examine *seriatim* the legal questions growing out of the charge.

Those questions may be thus stated : 1st. What effect upon the validity of the divorce have the facts, that the par-

ties were domiciled at the time of marriage, and were actually married, in a different State from that in which the divorce was granted? 2d. Was the residence of the husband alone in the State of Arkansas, the wife never having been in that State, sufficient to give the court jurisdiction over his matrimonial *status*? 3d. Is the decree of divorce void, when set up in this State in defence of a prosecution for polygamy, because only constructive notice by publication was given to the wife, who continued to reside in the State where the marriage was solemnized? 4th. Do the statutes of Arkansas, which were read in evidence, authorize a divorce for a cause which transpired out of the State, and which was not continued or completed in it?

The English doctrine, that the dissolubility of a marriage depends upon the law of the country where it may have been solemnized, has been generally repudiated by the American courts. That doctrine is founded in the theory of perpetual allegiance, and is inconsistent with the spirit of our institutions, which impose no restraints upon the change of domicile and citizenship. It has given way to the more just and reasonable theory, that the matrimonial *status* of the married pair is subject to the laws of the State in which they may be domiciled. The dissolution of a marriage, solemnized in South Carolina, the laws of which State do not tolerate divorces *a vinculo*, was decreed in this State; the validity of that decree was assailed in this State, and the doctrine that the question of divorce must be governed by the *lex domicilii* was maintained in a conclusive argument by this court. See the decision in the case of *Harrison v. Harrison*, 19 Ala. 499; see, also, *Bishop on Marriage and Divorce*, 745 to 761, and cases cited in the notes. Upon the authority of these citations, we decide, that the validity of the divorce obtained in Arkansas is not at all dependent upon the question whether it was warranted by the laws of this State, where the marriage was contracted, and where the parties resided at the time of the marriage.

It has never been decided in this court, whether the jurisdiction of the courts of a State to grant a divorce in favor of one domiciled in that State can be maintained, when the other of the married pair has always been domiciled and has al-

ways resided elsewhere. In the case of *Harrison & Saunders v. Harrison*, 20 Ala. 644, it is said, that if the husband and wife were domiciled in this State, and the wife should leave the husband, and go into another State, and there obtain a divorce *a vinculo*, it would be void; but in that very case it is decided, that the domicile of the husband determines that of the wife, and that, in legal contemplation, the husband and wife could not be domiciled in different States. While the application of this principle might deny to the wife the capacity to acquire a new domicile, distinct from that of the husband whom she had left, it interposes no barrier to the acquisition of a domicile by the husband in a different State from that in which the wife might have remained. The purposes of the argument do not require that we should assail or maintain the correctness of the principle, when applied to a suit by the wife for a dissolution of the marriage. It is sufficient to show that the decision in that case is not in the way of the conclusion that the husband who leaves his wife in one State, and emigrates to another, may acquire such a residence in the latter as will give its judicial tribunals jurisdiction over his matrimonial *status*. Both in the case of *Harrison v. Harrison*, 19 Ala., and *Harrison & Saunders v. Harrison*, 20 Ala., it is most conclusively proved, that the dissolution of a marriage appertains to the jurisdiction of the court of the country in which the parties are domiciled.

From the principle thus laid down in these two cases, it results, that jurisdiction over the question of divorce must be allowed to the courts of the domicile; and if the husband has the right to emigrate and acquire a new domicile, which in this country no one will deny, as a consequence he must acquire the right of having his matrimonial *status* controlled by the laws and judicial tribunals of the country of the new domicile.

If the divorce cannot be sought in the acquired domicile of the husband, it could only be sought in the tribunals of the country where the wife might happen to be. Whithersoever the wife might wander, the husband would be compelled to follow, no matter how flagrant her violations of conjugal duty might have been. The obtainment of a divorce would then depend upon the laws of the country where the suit might be brought; and it would thus be in the wife's power to select the country to be sued in.

Just principles of international amity require that there should be conceded to each State control over the matrimonial condition of its own citizens. The State has a deep concern in marriage, both for its fruits, and its influence upon society. It is unreasonable, therefore, to require a surrender by any State of the control of this subject in reference to its own citizens. No State will surrender it, and the result of its denial by other States would indeed be most disastrous to society. It would follow that a man divorced from his wife, who resided in another State, if he should marry in the State of his domicile, would be the husband of two women ; and his connexion with either would be legitimate or illegitimate, according as he might be in the one State or the other.

Much force must be conceded to the argument, that it is inconsistent with the analogies of the law to dissolve a marriage, when the court granting the divorce has no jurisdiction over the person of the defendant, and no personal notice of the proceeding has been given. Many authorities are to be found which sustain that argument.—Irby v. Wilson, 1 Dev. & Bat. Eq. 568; Borden v. Fitch, 15 Johns.; Vischer v. Vischer, 15 Barbour's S. C. R. 640; 10 Johns. 264; 1 *ib.* 224; Hanover v. Turner, 14 Mass. 227; Barber v. Root, 10 *ib.* 262.

All of the above citations, except one, are of New York and Massachusetts decisions. In none of the New York or Massachusetts cases was the validity of the decree for a divorce of another State held void, upon the exclusive ground of a want of notice and jurisdiction over the person of the defendant. In all of them, there was fraud in the procurement of the divorce, and the absence of a *bona fide* residence in the State where the divorce was granted ; and most of the decisions are based upon those grounds alone. We do not controvert the authority of those decisions, so far as they assert that fraud in the procurement of a divorce, or the want of a *bona fide* residence, on the part of the person obtaining it, in the State where it is granted, would render the decree null and void. Thus far they are sustained by reason and the other authorities. But we are of the opinion, that just principles of comity, the preservation of good morals, the peace of society, and the happiness of families, demand the recognition of the authority of the tribunals of any country,

in pursuance to its laws, to grant a divorce in favor of a party in good faith domiciled in that country. This position is well sustained by authority, as well as by reason and on principle. In the case of *Harding v. Allen*, 9 Greenl. 140, the validity of a divorce, granted upon constructive notice by publication in the gazette, and personal notice served in another State, was passed upon. The divorce was granted in Rhode Island, where the wife resided, and in her favor. The husband had never resided in that State, and the marriage was solemnized in Massachusetts. The validity of the divorce was sustained. In the decision of the case, no effect was conceded to the notice served upon the husband in another State. Such notice was in that, as in all other cases, held of no avail to confer jurisdiction. See 3 Phillipps on Evidence, C. & H.'s notes, 908 and 999, where the authorities are collected.

This decision recognizes marriage, not merely as a contract, but the political *status* or social condition of the parties; and therefore concludes, that the courts of the country where one of the pair is domiciled has jurisdiction over his person, and over the subject-matter, which is the *status*. This jurisdiction is by the court correctly restricted to the dissolution of the marriage, and cannot be extended to any incidental pecuniary question, or question of alimony. The very principle upon which the jurisdiction is predicated, limits it to the subject of divorce.

This decision of the Maine court has received the distinct approval of Chancellor Kent. In a note to Kent's Commentaries, 2 vol. page 110, in reference to it, the distinguished author says, it places the question "upon the same principles of justice, good morals, and policy, which render a marriage valid by the laws of the place where it is solemnized, valid every where." A decision thus approved and endorsed, is entitled to the highest confidence and respect. The decisions of the courts in several other States, fully sustain that cited from 9 Greenleaf.—*Tolen v. Tolen*, 2 Blackford; *Hull v. Hull*, 2 Strobhart's Eq. 174; *Mansfield v. McIntyre*, 10 Ohio, 27; *Cooper v. Cooper*, 7 *ib.* 238. See, also, Bishop on Marriage and Divorce, chapter 34; Story's Conflict of Laws, 191, § 236.

The general doctrine is not intended to be denied in this opinion, that decrees and judgments, when attempted to be set up in a different State from that in which they were rendered, may be avoided, where the court had no jurisdiction of the defendant's person, and there was no appearance ; but, in our judgment, that rule does not apply to decrees for a divorce. The jurisdiction over questions of divorce must be maintained, where the party seeking the divorce is domiciled in the country, and the proceedings are consistent with the laws of the State in which the party has his domicile. The right of a court, when authorized by the statute of the State, to proceed against the non-resident defendant by publication, results necessarily from the existence of the jurisdiction. If it cannot proceed on notice of that kind, it cannot proceed at all ; for no other notice can be given, and a denial of the power thus to proceed would be fatal to the jurisdiction.

The fact that the cause of divorce commenced and existed out of the State of Arkansas, and was never continued and completed within that State, would not avoid the decree. One of the statutes of Arkansas given in evidence prohibits the granting of a divorce to one who has not resided a whole year in the State, unless the offence was committed in the State, or while one or both of the parties resided in the State. The prohibition of divorce in this statute is to one who has not resided a whole year in the State, unless the offence was committed in the State, or while one or both of the parties resided in the State. To one who had resided in the State a whole year, there is no restriction of the privilege of divorce to cases where the cause occurred in the State, or while one or both of the parties resided in the State. The charge given is upon the express concession that the defendant had resided in the State a year. The defendant was, therefore, upon the hypothesis of the charge itself, one of the persons to whom the privilege of divorce was by the statute not restricted to causes occurring in the State, or while one or both of the parties resided in the State ; and the court, therefore, could not properly direct the jury, that they might infer the invalidity of the divorce from the fact that the cause of divorce occurred out of the State.

Another Arkansas statute given in evidence confers upon

the court the same jurisdiction, where the cause of divorce commenced out of the State and had been completed in it, as if it had commenced and been completed within the State. We think that the former of the two statutes was designed to confer upon persons who had resided one year in the State the privilege of divorce, no matter whether the cause occurred in or out of the State ; and to deny it to those who had not resided a year in the State, unless the cause occurred in the State, or while one or both of the parties resided in the State. The purpose of the latter statute was, not to take away from him who had resided in the State one year the right of divorce for a cause occurring out of the State, but to extend the ground of divorce in favor of him who had not resided in the State one year, to the case where the cause of divorce occurred out of, but was completed within the State. This construction harmonizes and gives effect to every part of the two statutes. Under these two statutes, in our judgment, the jurisdiction of the Arkansas court over the divorce of one who had resided a year in the State, would not be affected by the fact that the cause of divorce occurred out of the State.

Our conclusion is, that neither all, nor any one or more, of the facts upon which the court authorized the jury to find the divorce void, would render the decree a nullity. The charge was therefore erroneous.

The bill of exceptions does not set out any statute of Arkansas which confers jurisdiction over the subject of divorce upon the circuit court, which rendered the decree. The question is not before us for decision, whether the proof of such a statute was necessary to sustain the defence. The bill of exceptions does not profess to set out all the evidence, and it would not be legitimate for us to infer that such proof, if necessary, was not made. Our only duty is to decide whether there is error in the charge given. The question of the necessity of the proof indicated will probably not arise upon a future trial of the cause, as it may no doubt be easily made.

If the defendant did not go to Arkansas *animo manendi*, or, if he went to that State merely for the purpose of obtaining a divorce, and intending to remain no longer than was necessary to accomplish his purpose, or, if the divorce was procured by fraud, the decree of the Arkansas court would be void,

and the appellant, in marrying again in this State while his former wife was living, would commit the crime of polygamy.

The judgment of the court below is reversed, and the cause remanded.

CORLEY vs. THE STATE.

[INDICTMENT FOR TRADING WITH SLAVE WITHOUT MASTER'S CONSENT.]

1. *Ownership of slave how proved.*—The ownership of a slave, when alleged in an indictment, cannot be proved by general reputation.
2. *Charge upon credibility and sufficiency of evidence held erroneous.*—Where a witness for the prosecution is impeached by proof of his contradictory declarations on a material point, it is error to instruct the jury, "that they must believe the witness for the State, unless they believe that the contradicting witness is entitled to more weight and credit than said witness for the State." Such a charge invades the province of the jury, who are the sole judges of the credibility and degree of credit to be accorded to each witness; and it is also objectionable, because the contradicting evidence, though less credible than the testimony of the witness for the State, may yet be sufficient to raise a reasonable doubt in the minds of the jury, and thus secure the defendant's acquittal.

FROM the Circuit Court of Bibb.

Tried before the Hon. GEO. D. SHORTRIDGE.

INDICTMENT against Martha Corley, for trading with a slave, named Nat, alleged to be the property of one David Ward, without the consent of the master, owner, or overseer of said slave, verbally or in writing, expressing the article permitted to be sold, &c. The defendant excepted to the rulings of the court on the trial, which are thus stated in the bill of exceptions: "The solicitor, on the part of the State, proposed to prove, by general reputation, that the slave named in the indictment belonged to David Ward; to which the defendant objected, on the ground that such evidence was mere hearsay, and therefore illegal. The court overruled the objection, and permitted the witness for the State to tes-

tify that said slave was generally reputed to belong to David Ward; to which ruling of the court the defendant excepted. Another witness for the State testified, that he had seen the slave in the possession of David Ward. Upon examination of the first witness for the State by the defendant, he denied that he had made to defendant certain declarations which were material to the cause; and the predicate was duly laid, as to time, place, and declarations, in order to contradict said witness. The defendant then introduced a witness, who testified that said witness for the State did make the said declarations to defendant at the time and place named, and thus contradicted said witness for the State in a material matter. Upon this evidence the court charged the jury, that they must believe the evidence of the witness for the State, unless they believed that the contradicting witness was entitled to more weight and credit than said witness for the State; to which charge the defendant excepted."

No errors are assigned on the record.

WM. M. BROOKS, for the appellant, contended,—

1. That the ownership of a slave, being susceptible of direct and positive proof, cannot be proved by hearsay.
2. That the charge of the court was erroneous, because it invaded the province of the jury, and because it authorized them to find the defendant guilty, even though they should entertain a reasonable doubt of his guilt.—*Moore v. The State*, 12 Ala. 765; *Murphy v. The State*, 6 *ib.* 845.

M. A. BALDWIN, Attorney General, *contra*, insisted,—

1. That proof of Ward's possession of the slave was sufficient to raise the presumption of ownership.—*Jones v. The State*, 13 Ala. 156; *Walker v. Lauderdale*, 17 *ib.* 359; *Boltze v. The State*, 24 *ib.* 90.
2. That ownership may be proved by general reputation, in such a case as this, from the necessity of the case.—*Tucker v. The State*, 24 Ala. 79.
3. That the testimony of the witness for the State, so long as he was unimpeached, should be taken as true; and that this, in effect, was the substance of the charge.—*Lindsey v. Perry*, 1 Ala. 203.

STONE, J.—It is a general rule of law, that facts only can be given in evidence to the jury.—1 Greenleaf's Ev. §§ 98, 99, 100. This rule has its exceptions, but the ownership of property is not one of them. Whenever the pleadings present that issue, like all other facts it must be established by the best evidence which the nature of the question admits of. In the very nature of things, it is susceptible of better proof than general reputation.—*Ib.* § 82.

We are referred to the case of *Tucker v. The State*, 24 Ala. 77. *Tucker* was indicted for selling spirituous liquors to a free person of color. The question was not one of description, but one of *status*; and on that ground, this court held the evidence admissible. On this point it is sufficient to say that the questions are dissimilar.

In the charge to the jury, the primary court also mistook the law. The jury, in determining the facts of a case, are, of necessity, the sole judges alike of the credibility and the degree of credit to be accorded to each witness. True, the books on evidence lay down certain rules to aid juries in weighing evidence; but none of them justifies the decision made in this case. In our opinion, the charge invaded the province of the jury, and was calculated to mislead them. *Brown v. The Mayor of Mobile*, 23 Ala. 722; *Moore v. The State*, 12 Ala. 764.

It is argued for the appellant, that the charge under consideration is in conflict with that principle of the criminal law which defines the measure of proof necessary to conviction. In one aspect, it is so. The contradicting evidence may have been less credible than the testimony for the prosecution, and yet created a reasonable doubt in the minds of the jury, and thus secured the acquittal of the accused.

The judgment of the circuit court is reversed, and the cause remanded.

STALLS *vs.* THE STATE.

[INDICTMENT FOR HARBORING A RUNAWAY SLAVE.]

1. *Challenge of juror for cause on account of fixed opinion against capital or penitentiary punishment*.—On the trial of a person under an indictment for an offence which may be punished capitally or by confinement in the penitentiary, it is a good challenge for cause by the State that a juror has a fixed opinion against capital or penitentiary punishments.
2. *Right to challenge for this cause may be lost, and, when lost, cannot be revived*.—If the juror is accepted by the State, and afterwards by the prisoner, the State's right of challenge for this cause is lost, and cannot be again revived by any act of either the solicitor or the court, against the objection of the prisoner, although the existence of the cause of challenge was unknown to the solicitor and court when the juror was accepted by the State.
3. *Setting aside juror for cause of challenge, after acceptance, reversible error*.—If the court improperly set aside a juror for a cause of challenge on the part of the State which has been lost by previously accepting him, and the prisoner excepts to its decision, the error entitles him to a reversal of the judgment of conviction.

FROM the Circuit Court of Baldwin.

Tried before the Hon. C. W. RAPIER.

JOHN J. STALLS was indicted, at the November term, 1854, for harboring or concealing a runaway slave, knowing him to be a runaway, and was tried at the November term, 1855. On the trial, a bill of exceptions was sealed at his instance, which states the following facts: "After the regular panel of jurors had been exhausted, by challenges made by the State and the prisoner, one John P. Miles was summoned as a tales juror, at which time some seven or eight jurors had been selected. The said Miles, on being called, was sworn on his *voir dire*, touching his qualifications as a juror, and was asked whether he had any fixed opinion as to the guilt or innocence of the prisoner at the bar, which would bias his verdict; and answered, that he had not. The solicitor then announced himself content with said juror, and turned him over to the prisoner, who also announced himself content with him as a juror; and the said Miles was directed to take his seat in the jury box. Then the said Miles, before taking his

seat, and not having been sworn as a juror, and none of the other jurors who had been accepted having been sworn, but the whole jury being under the direction of the court, suggested to the court that, at the last term, he was excused, in a similar case, because he was opposed to penitentiary punishment; and the court thereupon permitted him, against the objection of the prisoner, to be asked the question prescribed by the statute, as to his opinion on the subject of penitentiary punishment. To this ruling of the court the prisoner objected, because the said juror had been already accepted; but the court overruled his objection, and he excepted. The said Miles answered, that he was opposed to penitentiary punishments. He was then asked by the solicitor, whether he would find a verdict for the State, if such punishment was fixed by law to the commission of an offence, and the proof should show the party to be guilty; to which he answered, that he supposed he would be compelled to do so, although he would not be doing justice to himself,—that he did not think a person ought to be put in the penitentiary for a long time, say, for instance, fifteen years, or for life. The court then directed that the juror should be asked the question prescribed in the Code; and the juror answered, that he had a fixed opinion against penitentiary punishments. The court then directed the said Miles to stand aside; to which ruling of the court the prisoner excepted.”

No errors are assigned on the record.

O. S. JEWETT, C. P. ROBINSON, and H. CHAMBERLAIN, for the prisoner, contended that the court erred in setting aside the juror, and cited the following cases: *Hines v. The State*, 8 Humph. 597; *Williams v. The State*, 3 Stew. 473; *Stone v. The People*, 2 Seam. 337; *Ephraim v. The State*, 2 Dev. & Bat. 165; *Commonwealth v. Leshner*, 17 Serg. & R. 160; *Coxe's (N. J.) R.* 220; *The State v. Potter*, 18 Conn. 166; *Commonwealth v. Webster*, 5 Cushing's R. 295; *Pierce v. The State*, 13 N. H. 557.

M. A. BALDWIN, Attorney General, *contra*, cited Chitty's Criminal Law, 545, note A; *The State v. Marshall*, 8 Ala. 302; *Haynes v. Crutchfield*, 7 *ib.* 195; *McClure v. The*

State, 1 Yerger, 206; Commonwealth v. Knapp, 10 Pick. 480; Hooker v. The State, 4 Ohio, 350; United States v. Cornell, 2 Mason's R. 105; Gillespie v. The State, 8 Yerger, 508; Beauchamp v. The State, 6 Blackf. 307; Hendrick's case, 5 Leigh's R. 715.

RICE, C. J.—In a trial for an indictable offence, which *may be* punished capitally, or by confinement in the penitentiary, it is a good challenge for cause *by the State*, that the juror has a fixed opinion against capital or penitentiary punishments.—Code, § 3585; *Ex parte McCrary*, 22 Ala. 65.

But the right of the State to challenge the juror for that cause is lost, when he is accepted by the State, and put on the prisoner, and accepted by him. After the right is thus lost, it cannot be revived by any act of the solicitor or the court, against the objection of the prisoner, although the solicitor and court were ignorant of the existence of that cause of challenge when the juror was accepted by the State and the prisoner. This is one of the advantages which the law allows to the prisoner on principles of humanity or policy. *The Commonwealth v. Leshar*, 17 Serg. & Rawle, 164, opinion of Gibson, J.; *Montague v. Commonwealth*, 10 Grattan's R. 767; *Dowdy v. Commonwealth*, 9 Grattan's R. 727; *McCauley v. The State*, 26 Ala. R. 135.

The decision of the court setting aside the juror for that cause, after he had been accepted by the State and the prisoner, is matter of exception on the part of the prisoner, which it is his right to have reviewed in this court; and such decision, having been made against his objection, and been duly excepted to by him, is an error which entitles him to a reversal of the judgment.—*Parsons v. The State*, 22 Ala. R. 50; *Montague v. Commonwealth*, 10 Grattan's R. 767; *The State v. Shaw*, 3 Iredell's R. 532; *McCauley v. The State*, 26 Ala. R. 135.

For the error of the court below in setting aside the juror, its judgment is reversed, and the cause remanded.

EX PARTE BANKS.

[APPLICATION FOR MANDAMUS TO COMPEL CHANGE OF VENUE.]

1. *When permissive words in statute will be construed imperative.*—The word *may*, when used in a statute, will be construed mandatory and imperative for the purpose of sustaining and enforcing rights, but not for the purpose of creating a right or determining its character.—*Per Walker, J.*, while *Rice, C. J.*, held, that a permissive word should be construed peremptory, when used to clothe a public officer with power to do an act which ought to be done for the sake of justice, or which concerns the public interest or the rights of third persons.
2. *Code construed with reference to previous judicial decisions.*—In the framing of the statutes embodied in the Code, the legislature must be presumed to have had in view the then existing laws, and the construction placed upon them by the judicial decisions; and where the provisions of the Code are substantially the same with the old law, the legislative sanction of the judicial construction which it had received may be inferred.—*Per Walker, J.*
3. *Change of venue in criminal case discretionary.*—The granting of an application for a change of venue in a criminal case (Code, §§ 3608, 3609) is discretionary with the court to which the application is made, and its refusal is not revisable in the appellate court by *mandamus* or otherwise. (*Rice, C. J.*, dissenting.)

APPLICATION by Thomas G. Banks for a *mandamus* to the city court of Mobile, Hon. Alex. McKinstry presiding, to obtain a change of venue in a criminal case. The petition presented to this court, with the accompanying exhibit, shows that said Banks was indicted, at the November term of said city court, 1855, for the murder of Wm. H. Trone; that he made an application, supported by affidavit, at the same term of the court, for a change of venue; and that his application was refused. The affidavit submitted in support of that application states, that the affiant does not believe that he can have a fair and impartial trial in either Mobile or Baldwin county; that said Trone was an old, influential, popular, and much esteemed citizen of Mobile, whose death created such an excitement that it was proposed by some persons to take summary vengeance on the defendant, who was a citizen of Lowndes county, Mississippi; that three of the four newspapers published in Mobile, some of which are read by almost every citizen of Mobile and by many citizens of Baldwin

county, and which contribute in a large degree to give direction and tone to public opinion in those counties, have, without waiting for an investigation of the real facts of the case, published misstatements of the facts, charging affiant with the crime of murder, and comments which have excited the community against him; that affiant has been confined in jail, has had no opportunity to stay the public excitement, and has no hope of being able to do away with the excitement and prejudice raised against him; and he appends to his affidavit, as exhibits, extracts from the Mobile Register, Advertiser, and Evening News, purporting to state the facts in relation to the death of Trone, with editorial comments, and describing the public excitement against Banks. On this showing, the court refused the application for a change of venue; and the petitioner now seeks to revise its action by *mandamus*.

DANIEL CHANDLER, for the petitioner :

1. This court has jurisdiction of the case.—Ala. Const., Art. V, § 2.

2. There is no other court that can “superintend or control” the action of the city court in criminal proceedings. It has concurrent jurisdiction with the circuit court in such cases, and its proceedings can only be revised by this court.—Pamph. Acts of 1846, p. 30; *ib.* 1850, p. 36; *The State v. Porter*, 1 Ala. 688; *Ex parte Pickett*, 24 *ib.* 91.

3. *Mandamus* is the proper remedy. The object of the writ is, to compel the person to whom it is directed to do something, which he is supposed to be bound by his duty to do, which the prosecuting party has a right to have done, and for which he has no other specific remedy.—7 Port. 47; 1 Ala. 688; 3 *ib.* 746; 4 *ib.* 317; 5 Watts & Serg. 403; 2 Stephens’ N. P. 2291-2.

4. By the constitution of the State (Art. I, § 10), every man, who is indicted for a criminal offence, is entitled to “a speedy public trial by an impartial jury”; and when the life of the unfortunate individual is involved in the issue, the court should be careful not to impair his rights, or to increase his jeopardy. The State has no election as to the county in which the case is to be tried. It is supposed to be ready and

prepared to try the case in the county in which the offence was committed, or in the adjoining county to which it may be transferred. Its citizens have no prejudice against its authority. Its officers are supposed to be honest. The public press cannot assail it, and has no inducement to impair its authority. Its object is justice, which can be administered by its officers as impartially in one county as in another. But the case is widely different with the defendant charged with the violation of the law. He may not be able to have "a fair and impartial trial" in the county in which the alleged offence was committed. It may have been committed under circumstances well calculated to excite public sympathy for the deceased, and popular indignation against the accused. The former may have been popular, influential, highly respected, and much beloved; and the latter a stranger, without friends, and, though innocent of the crime, may have been imprudent, and therefore liable to be misrepresented, censured and condemned. The public press may add fuel to the flame, and, by misrepresentations, exaggerated statements, and inflammatory appeals, prepare the public mind for injustice, violence, and vengeance. The legislature knew this, and made provision for such a case. It permits the defendant, when charged with an indictable offence, (and more certainly in a capital case,) after making affidavit setting forth the reasons why he cannot have a fair and impartial trial in the county in which the indictment was found, to remove his trial to another county.—Code, § 3608.

5. The affidavit, and the facts embraced in the bill of exceptions, comply with the requirements of the statute, and are sufficient to satisfy any reasonable man that a fair and impartial trial cannot be had in Mobile. It appears that three out of the four public presses in the city have commented freely on the case, have misstated the facts, have appealed to the prejudices and passions of the public, and have excited and exasperated the popular mind, to such an extent that, "wherever you go in the city, or whosoever you meet, sympathy is expressed for the deceased, and punishment is invoked on the accused." The deed is pronounced "murder"; it is alleged to have been committed "without provocation"; it is said that "nothing can palliate the atrocity of the act, and

even the ingenuity of counsel cannot make it out an accident." One of the papers, after showing that confinement in the penitentiary is too good for such a "criminal," states that even his conviction and execution will not satisfy the public—that summary vengeance, and the execution of the accused under the law of the "regulators" and on the "first tree," are invoked. These papers are extensively read and circulated in the county; they represent the three great parties in the State, and, in a great measure, form and mould public opinion. Are not these facts, all of which are set forth in the affidavit, sufficient, specific, and satisfactory?

6. The judge below decided, contrary to right, to justice, and to law, that the accused was not entitled to a change of venue; and it is now said that his decision is not revisable. Is this so? A right so important, so essential to the liberty and life of the citizen, is not left to the discretion of the judge who may try the cause. If this were the case, the remedy would be incomplete and ineffectual. If left to the caprice, prejudice, or discretion of the judge, the right would be abused, and the fate of the accused would be decided, not on the evidence, nor by the law, but by prejudice or passion, or in conformity with the wishes of an excited populace. Judges are mere men; and we have read history to little profit, if we do not know that, while they are dependent on the people for their election, they will not be independent of their favor and good opinion. The legislature wisely provided, therefore, for a change of venue under particular circumstances; and if the accused presents, under oath, such a state of facts as will satisfy a reasonable man that an impartial trial cannot be had in the county in which the indictment was found, *he has the right to insist on a change of venue*. If the primary court refuse the application, this court will compel it to do what is necessary for the safety of the citizen and the administration of justice.

7. It is said that the word "*may*," as used in section 3608 of the Code, gives the judge a discretionary power to grant or refuse the application, and that his decision is final and conclusive. In the adoption of the Code, the legislature is presumed to have known the construction placed by this court on the word "*may*." It means *must*, or *shall*, when used in a

statute, in all cases where the public interests are concerned, or the rights of third persons are involved, which require the performance of an act.—9 Port. 396; 17 Ala. 532; 5 Johns. Ch. 113. If the language of this section had been in conformity with these decisions, and the word "*shall*" had been used instead of "*may*," could any one have doubted its meaning, or questioned the duty of the court? The language would then have been imperative; and the rights of the accused, and the duty of the court, would have been plain. The language of the Code is permissive, but its construction by this court is imperative and peremptory; and wherever a statute, or a court in construing a statute, directs something to be done, the court will compel its performance.—2 Stephens' N. P. 2292; Rex v. Everet, Cases temp. Hardwicke, 261.

8. It is submitted that there is a difference between the language of the Code and that of the acts of 1819 and 1821, under which the cases of Brookshire and Ware (2 Ala. 303, and 10 *ib.* 814) were decided. In both of those acts, a discretion is given to the judge, and he is to determine "the sufficiency of the cause." He has the "power" to refuse the application under one act, and it is "lawful" for him to refuse it under the other; and having exercised the power and the right, under either act, to the best of his ability, his decision cannot be revised. But, under the Code, the judge not only has the "power" to grant the application—it is not only "lawful" for him to do it, but he *must* and *shall* do it, if the application sets forth sufficient reasons why the defendant cannot have a fair and impartial trial. The right to a change of venue, in such a case, does not depend upon the discretion of the judge; and if he refuse the application, this court, in superintending and controlling his decision, must see that justice is done. This court can examine the facts, consider the reasons, and compel the inferior court to do justice to the citizen, and faithfully to administer the law. The defendant's rights depend, not on the judgment or opinion of the court below, but upon the law, upon the facts disclosed in the application, upon the reasons assigned for a change of venue; and if they are sufficient, this court has the power, and it is its duty, to compel that to be done which the citizen has a right under the the constitution and laws to insist should be done.

9. Public policy requires that applications for a change of venue, when honestly made and supported by facts, should be favored and encouraged. The State cannot be injured, and the slight inconvenience to which she may be subjected cannot compare with the importance of administering justice, and of giving every citizen a fair and impartial trial. She is interested in defending the character and in preserving the lives of her citizens. She should not desire the conviction of an innocent man, or the vindictive prosecution of a guilty one. The law presumes every one innocent, until he is proved guilty; and the State should give him a fair and impartial trial. This cannot be done, if the case is prejudged, and public opinion is prejudiced against the defendant. No one can read this application, and the facts therein satisfactorily established, without coming to the conclusion that the trial in this case should be removed from Mobile. A fair and impartial trial is the glory of our law, and it should be the aim of our judges. If this great and important end is defeated by the decision of one judge, let it be promptly and effectually secured by the decision of the controlling and superintending tribunal of the State.

M. A. BALDWIN, Attorney General, *contra*:

1. The power to change the venue in criminal cases is discretionary with the circuit court.—*Brookshire v. The State*, 2 Ala. 305; *Ware v. The State*, 10 *ib.* 815; *Gasaway v. Smith*, 3 *Humph.* 157; *Findley v. The State*, 5 *Blackf.* 576; *Spence v. The State*, 8 *ib.* 283; *Bank of Cleveland v. Ward*, 11 *Ohio*, 128; *Roscoe's Criminal Evidence*, 260.

2. But, if the power be not discretionary, the petitioner is not entitled to a change of venue in this case, because the facts are not sufficient. The motion is based principally on newspaper comments in the case. Neither of the papers published that Banks was guilty of murder, but that he had "involved himself in the crime of murder." Indeed, one of the papers states a fact, which, if true, would go far to acquit the prisoner—to-wit, that he "was crazy with drink." Nor is the affidavit sufficiently specific. It states that the newspapers have "misstated the facts", but does not say wherein. This is too general: the misstated facts should have been

disclosed in the affidavit, to enable the court to decide whether they were material, and whether a fair and impartial trial could not be had in Mobile. Mere belief on the part of the prisoner, that he cannot have a fair trial, is not sufficient. The affidavit does not disclose a single person prejudiced against the prisoner in consequence of the newspaper comments.—The People v. Bodine, 7 Hill's (N. Y.) R. 149; The State v. Burriss, 4 Harr. (Del.) R. 582; Moses v. The State, 11 Hunph. 238; Bowman v. Ely, 2 Wend. 250; Boswell v. Flockheart, 8 Leigh, 364.

3. Admitting that the power to change the venue is not discretionary with the circuit judge, and that a *mandamus* will lie from this court, in a proper case, to compel the change; yet, before this court will grant the writ, the case must be a clear one upon the facts, and the party unequivocally entitled to it.—1 Chitty's Criminal Law, 201; The People v. Vermilyea, 7 Cowen, 138; The State v. Williams, 2 McCord, 382; Rex v. Harris, 3 Burr. 1333; The People v. Bodine, *supra*; Roscoe's Criminal Evidence, 260.

WALKER, J.—The decision of the question before this court depends upon the construction of the statute in reference to changes of venue in criminal cases. If the statute confers upon accused persons a legal right, not determinable alone by the judgment of the court to which the application is made, this court must, in the performance of the constitutional duty of exercising "a general superintendence and control of inferior jurisdictions", revise the action of the court below in reference to that right. If the statute confers a right to a change of venue, only when the judgment of the court hearing the application is convinced that a fair and impartial trial cannot be had in the county in which the cause is pending, the decision of the court is not revisable, by *mandamus* or otherwise.

Sections 3608 and 3609 of the Code are in the following words: "The trial of any person charged with an indictable offence may be removed to another county, on the application of the defendant, duly supported by affidavit."—"The application must set forth specifically the reasons why the defendant cannot have a fair and impartial trial in the county in

which the indictment was found, and must be made as early as practicable before the trial, or may be made after conviction, on a new trial granted."

The word "*may*" in a statute, although a word of permission, is sometimes construed as if it were the synonym of "*must*," or "*shall*". The instances in which it is to be so construed are said, in a decision of this court, to be where the public interests and rights are concerned, and where the public or third persons have a claim *de jure* that the power shall be exercised.—*Ex parte* Simonton, 9 Porter, 395. The language of this court in another case, determining the effect of permissive words, is as follows: "Such words, when used in a statute, are regarded as peremptory, when the public, or an individual, has a right *de jure* that the powers conferred should be exercised.—*Gould v. Hayes*, 19 Ala. 462.

The effect of the principle thus enunciated, in kindred language, in the two cases cited, is, that "*may*" must be, by construction, converted into an imperative word, for the purpose of sustaining and enforcing rights, and not for the purpose of creating them, or determining their character. A mandatory meaning may be imputed to the word "*may*" in the statute quoted, if the statute has conferred a right; but it involves an unauthorized extension of the principle, to resort to that construction for the purpose of showing that the statute designed to confer a right, or for the purpose of determining the character of the right conferred. There can be no doubt, that where a right is conferred, or something for the public benefit, or in promotion of public justice, is prescribed, and authority is conferred by permissive words to carry out the statutory purpose, these words are obligatory, and the exercise of the authority may be demanded as a matter of right, in an appropriate case.—*Dwarris on Statutes*, 53. The permissive word is to receive an obligatory construction, *because* the statute confers a right, or is for the public benefit, or in promotion of justice. That construction results from the fact that a right is conferred, and is not the controlling rule in ascertaining the purpose of the legislature as to the conferring of a right. The word "*may*", in the statute under consideration, cannot be construed as "*must*" for the purpose of showing that an unconditional right to a change of venue, ir-

respective of the judgment of the court hearing the application, is conferred. In order to determine whether a right is bestowed, and how that right is to be ascertained, we must resort to the usual rules for the interpretation of statutes ; and afterwards we must give the permissive words such a construction as will secure the enforcement of the rights conferred.

Does, then, the statute confer an unqualified legal right to a change of venue, when the proper showing is made, or merely a right to claim it from the enlightened judgment of the court to which the application is made ? In the former alternative, " may", as found in the statute, will be construed as mandatory. In the latter alternative, we must give it its accustomed signification.

The act of 1819 (Clay's Digest, 343, § 166) is in the following words : " Judges of the circuit courts, within their respective circuits, at or before the first trial term of any suit, civil or criminal, *shall have the power* to change the venue thereof, *on good and sufficient cause*, set forth and duly supported by oath or affirmation." The act of 1821 (Clay's Digest, 480, § 26) is in the following language : " *It shall be lawful* for the judges of the circuit courts, respectively, to grant to any person charged with a criminal offence a change of venue, *for sufficient cause shown*, at any time, either at the first trial term, or, if the case should be continued, or a new trial had after conviction, at a subsequent term." There is no matter of difference between these two statutes and the sections of the Code quoted, which could affect the question of the revising power of this court over the action of the circuit court under them. The former of the old statutes uses the words "*shall have power*," &c. The latter uses the words, "*it shall be lawful*." The language of the Code is, " the trial of any person charged with an indictable offence *may* be removed," &c. No material distinction can be drawn, as to the import of the three expressions, "*shall have power*", "*shall be lawful for*", and "*may*". They are alike permissive words, which, in their strict meaning, import an authority conferred, and not an obligation imposed. In *Gould v. Hayes*, *supra*, the words " shall have full power" were under construction ; and in *Ex parte Simon-ton*, the word " may" was construed. The expressions in the

two decisions were alike treated as permissive words, susceptible of an imperative construction when a right is conferred, and the public or third persons have a right *de jure* that the power should be exercised.

The two old statutes and the Code are different in this: one of the former says, that the change of venue shall be granted for "*sufficient cause*", and the other for "*good and sufficient cause*"; while the Code prescribes the inability of the defendant to have a fair and impartial trial in the county as the cause for a change of venue. The Code states the cause for which the venue may be changed; the old law leaves it undefined. The old law leaves undetermined the cause, and the sufficiency of the proof; the Code determines the cause, but leaves the sufficiency of the proof that the cause exists to be determined by the judge. The difference in this respect affords a just argument to prove that the margin left for the judgment of the court below is narrowed by the Code, but not that it is taken away. When the cause for a change of venue is prescribed, there remains still a large margin for the exercise of the judgment and discretion of the court. Even before the adoption of the Code, the practice in the circuit courts had fixed the improbability that a fair and impartial trial could be had in the county as the cause for a change of venue; so that there is a correspondence between the practical effect of the old law, and the language of the new. It is fairly inferrible, therefore, that the departure in this respect from the phraseology of the old law was designed to effect a conformity to its practical operation, and not to change it.

The language of a subsequent section of the Code is, that the trial "must be removed to the nearest county free from exception." If the decision of the court upon the question of the change of venue is revisable, so must its decision upon the other question of the county to which the cause is removed be revisable. The Code prescribes no *criteria*, by which it is to be determined whether a county is "free from exception"; and a decision in favor of the revising power of the court in this case would lead to the conclusion, that the decision of the court as to whether a county is free from exception is revisable. The uncertainty and indefiniteness of the Code in

this respect is certainly not less than that which characterized the old law. There is as clear an absence of rule for the government of the court in deciding whether a county is free from exception, as in deciding whether a cause should be continued.

From what has been said, the conclusion is attained, that there is no difference between the law found in Clay's Digest and in the Code, which effects the question in this case.

In the case of *The State v. Brookshire*, 2 Ala. 303, and of *The State v. Ware*, 10th Ala. 814, the old statutes underwent an examination in this court. In the former case, the question was before the court by writ of error; in the latter, it was referred as novel and difficult. In both cases, the revising power of this court was invoked after conviction. It is decided in both cases, that the action of the circuit court, on an application for change of venue, is not revisable. The decision of the former case is placed exclusively on that ground; in the latter case, the additional reason is assigned that a *mandamus* would be the only remedy. An examination has not detected any impeachment in any subsequent case of the authority of those two cases. They must, therefore, be deemed to have been the subsisting recognized judicial expositions of the law of this State at the time of the adoption of the Code. In the framing of the statutes found in the Code, the legislature must be presumed to have had in view the existing law, and the construction placed upon it by this court. By carrying into the Code a law substantially the same with that which previously existed, the legislature must be intended to have had reference to the construction placed on the old law, and the legislative sanction of it may therefore be inferred.—*Duramus v. Harrison & Whitman*, 26 Ala. This conclusion is corroborated by the fact, patent in the Code itself, that the existing judicial expositions of the law were had in view in its construction, and that many of its provisions are accommodated to them.

There are other arguments persuasive to the conclusion that the question of change of venue is one not revisable. The act contemplates that the court may act, in changing the venue, upon no other evidence than the *ex parte* affidavit of the accused. The question whether that affidavit may be

controverted is not involved in the argument, and is therefore pretermitted. Not only the rights of the accused, but the interests of the State, and the convenience of witnesses, are concerned. When the claim to change of venue is made to rest upon such evidence,—when there is no oral examination, or cross-examination of witnesses, there is no possibility of ascertaining the facts with certainty upon which the court is to act. Besides, the question whether a fair and impartial trial can be had in a particular county is one which, from its very nature, cannot be subjected to any certain and definite tests, and as to which scarcely a proximate certainty can be attained. It is conceivable that, in the decision of such a question, determinable by such evidence, the judgment of the court hearing the application would alone be consulted. It is not probable that the legislature would have made a question, thus susceptible of no definite and reliable determination, the subject of revision in this court.

If, when a change of venue has been refused, the court should refuse to continue the case, until a decision could be had in this court, the injured party would be unable to avail himself of his remedy by *mandamus*. The allowance of a continuance is admitted to be discretionary, and therefore it is impracticable to place the question beyond the control of judicial discretion. If the argument that the statute confers a right entitled to protection in this court, is traced through its consequences, it will be found that an effectual immunity from the errors of the court below could only be afforded by giving the injured party a right, after conviction, to assign the refusal of his application as error. This would be the necessary result of the argument made.

I regard the change of venue as one of those matters which must be left to the control of the judgment and discretion of the presiding judge. Human judgment, and human reason, are fallible; and, no doubt, many hard cases must arise, and injustice may occasionally be done. But the same thing is true of applications for continuances, to file additional pleas, to introduce overlooked testimony after the argument of the cause has commenced, and for new trials. These are all matters which quite as much involve the interests of the parties, as questions of change of venue; and yet, in our system of

jurisprudence, they are determinable alone by the court before which the cause is pending.

The decisions of the courts of our sister States, in reference to the change of venue, are generally based upon statutes. For that reason, they are not referred to as authorities in this opinion ; but none of them are in conflict with the conclusion attained.

The affidavit, with the accompanying papers, before the city court of Mobile in this case, in my judgment authorizes the conclusion that there is in the county of Mobile and Baldwin a state of public feeling and sentiment such that there is a strong probability that the accused cannot have a fair and impartial trial in either of those counties. The refusal of the *mandamus*, therefore, is not intended to indicate an approval of the action of the court below.

The application must be dismissed, at the cost of the petitioner.

STONE, J.—I am not able to detect any material distinction between the language employed in the Code (§§ 3608–9–10) and that found in the previous acts of 1819 and 1821. The act of 1819 (Digest, p. 343, § 166) uses the words, “good and sufficient cause, set forth and duly supported by oath or affirmation.” The act of 1821 (*Ib.* p. 480, § 26) was intended to enlarge the *time* within which the application may be made and entertained ; and, in my opinion, does not restrict or enlarge the *grounds* on which the court below acts. In the act last stated, the words are, “for sufficient cause shown”, &c. The Code declares, that “the application must set forth specifically the reasons why”, &c. “Good and sufficient cause”, “sufficient cause”, and “reasons why”, are, to my comprehension, almost synonyms, when found in the statutes above quoted. Each of them supposes a *ground*, a *cause*, a *reason*, why the action of the court is invoked ; but neither expression conveys the remotest idea of what the cause or reason shall consist of. No fact, or set of facts, are expressed in either of said statutes or the Code, as constituting, when they exist, that cause or reason. Each expression is a conclusion to be drawn from a fact or set of facts, and neither is in itself a fact.

Neither is there anything in the argument predicated on the language of section 3609 of the Code, which requires the affidavit to set forth the reasons why "the defendant cannot have a fair and impartial trial in the county in which the indictment was found." This section expresses the object to be attained—viz., a fair and impartial trial; but whether that can be had in the county in which the indictment was found, is, at most, a conclusion, and never can be a demonstrable fact. Like all other conclusions, it can only be drawn from facts set forth. The legislature having uniformly refrained from prescribing what fact or facts shall be sufficient, it follows that they must be of such a character as reasonably to convince the presiding judge that a fair and impartial trial cannot be had in the county in which the indictment was found.

As a test of the correctness of this verbal criticism, let it be supposed that an affidavit for change of venue employs the very language of section 3609 of the Code, or of either of the statutes of 1819 and 1821, and it will be, at once, pronounced insufficient. It would contain no fact or evidence upon which the judge could act, and from which he would be authorized to draw the desired conclusion. To enable him to do so, under either the old or the new law, facts must be sworn to; and if they amount to "good and sufficient cause", "sufficient cause", or "reasons why" the venue should be changed, it is the duty of the judge to grant the order.

The words in the Code, "The application must set forth specifically", &c., do not establish a new rule. The only correct practice which could prevail under the statutes of 1819 and 1821, would require a statement of the facts. In judicial proceedings, all necessary facts should be stated clearly, distinctly. No particular potency attaches to the word specifically. It is but the antithesis of the word generally, and forbids a too general statement of the grounds for change of venue.

In my opinion, the cases of *Brookshire v. The State*, 2 Ala. 303, and *Ware v. The State*, 10 *ib.* 814, correctly ascertain the law on this question. This, like many other duties which devolve on the presiding judge during the progress of a suit

or prosecution, must be left to his sound and enlightened discretion. It may be abused. So may many other discretionary powers, which are admitted not to be revisable. If this be an evil, the legislature can remedy it.

I do not wish to be understood as sanctioning the action of the court below in this case. All I decide is, that a change of venue cannot be coerced by *mandamus*.

RICE, C. J.—A defendant in an indictment, whether he be really guilty or innocent, has the right to a fair and impartial trial. The preservation of that right is a matter of public concern, and is demanded by justice and the public welfare. A refusal to render a defendant in an indictment the means provided by law for obtaining a fair and impartial trial, may be as injurious to him as the direct refusal of such a trial would be. Such refusal is a denial of justice, and ought not to be without remedy.

At the adoption of the Code, it was known that the removal of the trial from the county in which the indictment was found had been, and would again be, in some cases, essential to the preservation of the right of the defendant to a fair and impartial trial; and that under the acts of 1819 and 1821, in relation to changes of venue, it was *a mere matter of discretion* with the judge to whom the application was made, whether he would grant or refuse a change of venue.—Ware v. The State, 10 Ala. 814. If the legislature had intended that, under the Code, the granting or refusal of a change of venue should *continue to be a mere matter of discretion*, I think the provisions of the acts of 1819 and 1821, either in words or substance, would merely have been re-enacted in the Code. But, instead of merely re-enacting in the Code the words or substance of those acts, the legislature went greatly beyond that, and did what never before had been done, to-wit, *defined with particularity the cause* for which a change of venue should be allowed, and *prescribed the mode of proceeding* to obtain a change of venue.

In these respects, the provisions of the Code differ essentially from the acts of 1819 and 1821, and from the statutes of those States whose decisions are relied on by a majority of the court in the present case.

The sections of the Code, relating to this subject, are as follow :

"§ 3608. The trial of any person charged with an indictable offence may be removed to another county, on the application of the defendant, duly supported by affidavit.

"§ 3609. The application must set forth specifically the reasons *why the defendant cannot have a fair and impartial trial in the county in which the indictment was found*, and must be made as early as practicable before the trial, or may be made after conviction, on a new trial granted.

"§ 3610. The trial can be removed but once, and *must be removed to the nearest county free from exception.*"

The acts of 1819 and 1821 did not specify, nor undertake to hint at or define, any cause for which a change of venue might be allowed. Their provisions were so loose, general, and indefinite in all respects, as to show that it was the intention of the legislature, in adopting them, that the matter of a change of venue should rest merely in the discretion of the judges of the primary courts, and that there should be no revision of the exercise of that discretion. Those acts did not contain or prescribe any definite rules for the regulation or control of the exercise of that discretion, and therefore a revision would have been impracticable; for the revising court could not well have decided that the rules or regulations for the exercise of the discretion had been violated, when no such rules or regulations had been established by law.

But, under the Code, the case is entirely different. In it, the cause for which a change of venue is to be allowed is clearly defined—to-wit, that the defendant cannot have a fair and impartial trial in the county in which the indictment was found. The mode of proceeding to obtain a change of venue is proscribed; and when a change of venue is granted, it is distinctly declared, that the trial "*must be removed to the nearest county free from exception.*"

It seems to me incredible, that, in a Code of laws prepared with deliberation, and adopted by the legislature for a people who love liberty and justice, three such carefully drawn sections, so strikingly different from the former statutes on the same subject, could have been inserted *for no other purpose*

than *merely to permit* a judge of a primary court to grant a change of venue only when he thought fit to grant it!

It also seems to me incredible, that the real meaning of these sections of the Code is, that in deciding whether he will allow a change of venue or not, the judge of the primary court acts as a sovereign, who can do no wrong, and is not responsible to any tribunal on earth; but that yet, if, in the plenitude of his power, he should graciously allow a change of venue, then and there his discretion ends, and he "*must*" send the case to the nearest county free from exception!

Yet, if the opinion of the majority of the court is correct, both the foregoing singular propositions are good law. It is evident that my brethren would not have attained the conclusion which they have attained, if the word "*must*" were inserted in lieu of "*may*" in section 3608. They seem to concede, that "*must*" is a peremptory word where it occurs; but they insist that "*may*", as used in section 3608, is permissive merely: and the argument on their side is, that whilst the word "*may*", where it occurs in a statute in relation to an *existing right*, is peremptory, yet that word *never creates a right*.

If that argument is right, all the authorities are wrong; for they agree that the word "*may*" in a statute can *create a right*,—that, whilst it is permissive merely, where the public or third persons have no interest in having it considered as imperative, yet it is peremptory, where it is used in a statute to clothe a public officer with power to do an act, which ought to be done for the sake of justice, or which concerns the public interest, or the rights of third persons. Conferring the power on the officer to do such act, *creates a right* in those for whose benefit the power was conferred; and they may insist on the execution of the power, as a duty, "though the phraseology of the statute be permissive merely, and not peremptory." See the cases collected in Smith's Commentaries on Statutes, §§ 595 to 604; *Ex parte Simonton*, 9 Porter's R. 395; *Gould v. Hayes*, 19 Ala. 462.

If the legislature designed, as I think it did, by the provisions of the Code above quoted, to confer on a defendant in an indictment *the right* to a change of venue, where he applies for it in due time and in the prescribed mode, and establishes

in legal contemplation the fact that he cannot have a fair and impartial trial in the county where the indictment was found, it was fit to use the word "*may*" in section 3608. It would have been improper to use the word "*must*", in lieu of "*may*", in that section; because, if that had been done, the section, interpreted literally, would have made it the duty of the court to remove the trial to another county, on the mere "*application* of the defendant, duly supported by affidavit", without regard to *the sufficiency* of the reasons why he could not have a fair trial in the county where the indictment was found. It was not the design of the Code to make it the duty of the judge of the primary court to grant a change of venue, merely because there was an "*application*" made for it, duly supported by affidavit. But the design was, to make it his duty to grant it only when the application was made in due time, and in the prescribed mode, and specifically set forth facts and circumstances which, in legal contemplation, established the proposition that a fair and impartial trial cannot be had by the defendant in the county where the indictment was found. The design was not to deprive the judge of the exercise of discretion and judgment, nor to arm him with an arbitrary or capricious discretion; but to invest him with a discretion, regulated, as nearly as may be, by general rules, and to be exercised, in granting or refusing such applications, in accordance with justice and the laws of the land.

Whilst I do not deny the exercise of discretion to the judge, I maintain that his discretion must be exercised consistently with the rules of law; and that, if it is not so exercised, we are bound to revise it, and to apply the proper remedy.—*Durousseau v. The United States*, 6 Cranch, 312 to 319. In bills for specific performance of a contract, the chancellor has a discretion; yet his action on such bills is revisable. In applications for bail, the judge has a discretion; yet his action in that matter is revisable. And I lay it down generally, that "whenever a suitor is *entitled to a right*, which is withheld from him by the decision of a court," it cannot, in any just and accurate sense, be called "a mere matter of discretion", but is revisable.—*Wormeley v. The Commonwealth*, 10 Grattan's R. 658; *Etheridge v. Hall*, 7 Porter's R. 47;

Ex parte McCrary, 22 Ala. 65; Vaughn v. Robinson, 22 *ib.* 519; Gordon v. Longest, 16 Peters, 97; Montague's case, 10 Grattan, 767; McCauley v. The State, 26 Ala. 135; Ned v. The State, 7 Porter's R. 187; Pulliam v. Owen, 25 Ala. 492.

It has been asserted, with seeming confidence, that no authority could be found for the position I maintain. I might, with equal confidence, assert that no decision can be found opposed to the views I have advanced, *upon any such statute provisions as are contained in our Code*. But it is a great mistake to suppose that my view is unsustained by authority. The cases and principles above mentioned clearly sustain my position. The case of Wormeley v. The Commonwealth, 10 Grattan's R. 658, sustains it; and the supreme court of the United States, in Gordon v. Longest, 16 Peters, 97, made a decision unanimously, which not only sustains the views above announced by me, but goes further than I go. See, also, the opinion of C. J. Marshall in *Durrosseau v. The United States*, 6 Cranch, 312 to 319.

According to the construction put upon the Code by my brethren, as I understand it, there is no such thing in Alabama as *a right to a change of venue!* If a defendant in an indictment applies, in due time and in the prescribed mode, for a change of venue, and by his application and proof conclusively shows that he cannot have a fair and impartial trial in the county in which the indictment was found, and that a change of venue is essential to procure for him a trial by "an impartial jury", my brethren hold that he has no right to a change of venue—that the judge of the court where the indictment was found may keep him, and force him to be tried in the county in which it is clear he cannot have a trial by "an impartial jury."

I cannot assent to the reasoning or conclusion of my brethren. Nor am I in any degree the more inclined to adopt their conclusion, from the alleged fact that already the judges have powers merely discretionary, by which they may do much injury to the rights of the citizen. If this be so, it is no reason why they should be clothed with any more such power. In theory, our government is one of *laws*, and not of *men*; and it ought to be made so in practice.

SWEENEY vs. THE STATE.

[INDICTMENT FOR GAMING.]

1. *Construction of statute (Code, § 3243) against gaming.*—Windham's case, 26 Ala. 69, and Brown's case, 27 *ib.* 47, as to construction of statute against gaming, reaffirmed.

FROM the Circuit Court of Barbour.

Tried before the Hon. NAT. COOK.

JAMES L. SWEENEY was indicted at the January term, 1854, for gaming, and was tried at the May term, 1855. The bill of exceptions, which was taken by him on the trial, is as follows: "The State proved, that the defendants played a game of cards, in Barbour county, within twelve months before the finding of the indictment; that the place where said playing took place was in a room over a country store; that said room was entered on the outside, by steps, and was disconnected from the store; that the furniture of said room consisted of some chairs and a mattress; that it was sometimes used as a sleeping place by the proprietor of the store, who kept the key of said room; that no goods of any description were kept or sold in said upper room, but that sometimes, when the store was crowded, persons who wished to adjust their accounts in private went up, by special permission, for that purpose; that such persons never went up while the defendants, or any other persons, were playing cards there. It was shown that goods and merchandise were sold in the store beneath, but not that any spirituous liquors were sold or given away there. When the playing took place, the door of the upper room was closed and locked, and nobody was allowed to enter, except upon being recognized and approved, nor could anybody enter without permission; all others were refused admission. It was not shown that there was any passing in or out of said room during said playing, except that one witness swore he knocked at the door; and, upon making himself known, was allowed to enter. Only four or five persons were present at the playing, which took

place with the assent of the proprietor, who furnished the defendants with the key for that purpose. It was shown, also, that persons playing in said upper room could not be seen from the road on the outside, and that there was no communication between the store and said upper room, by door or otherwise. Upon this state of facts, the court charged the jury, that the place where the playing took place was a public house, within the meaning of the statute; and that, if they believed the evidence, they must find the defendant guilty. The defendant excepted to this charge, and he now assigns it for error.

LEWIS L. CATO, for the appellant.

M. A. BALDWIN, Attorney General, *contra*.

RICE, C. J.—In *Huffman v. The State*, at the present term, upon a re-examination of the cases of *Windham v. The State*, 26 Ala. 69, and *Brown v. The State*, 27 Ala. 47, we announced our determination to adhere to the exposition of section 3243 of the Code contained in them. Upon the authority of those cases, we affirm the judgment in the present case.

HUFFMAN vs. THE STATE.

[INDICTMENT FOR GAMING.]

1. *Charge dispensing with proof of venue, erroneous.*—Held, on the authority of *Brown's case*, 27 Ala. 47, that a charge which instructed the jury "that, if they believed the evidence, they must find the defendant guilty," when the bill of exceptions purported to state all the evidence, but did not show that the venue was proved, was erroneous.
2. *Construction of statute (Code, §3243) against gaming.*—*Windham's case*, 26 Ala. 69, and *Brown's case*, 27 *ib.* 47, as to construction of statute against gaming, re-affirmed.

FROM the Circuit Court of Coosa.

Tried before the Hon. GEO. D. SHORTRIDGE.

INDICTMENT against Henry A. Huffman, in the general form prescribed by the Code, for gaming. The bill of exceptions, sealed on the trial at the instance of the defendant, is as follows: "The State introduced a witness, who testified, that he had seen the defendant, with five others, within twelve months previous to the finding of the indictment, playing cards in the defendant's bed-room ; that the doors were locked, the windows closed, and cloth hung over the key-holes, and over every crack through which a person could peep in or see them ; that he had seen defendant playing there several times ; that the playing was always at night, and no person ever came there except those who were invited by the proprietor, who was the defendant, and none but the persons whom he saw playing ; that there were no persons looking on ; that the public never went there ; that no one had a right to go there, except those who were invited there by the defendant ; that they played merely for amusement ; that the bed-room was attached to defendant's store, in which there was a post office, and communicated with the store by a door, which was bolted at the time of the playing ; that there was but one other door in the bed-room, and that was an outside door ; that those who were invited came into the room through the outside door ; that there was a shed, divided into two rooms, on one side of the main store-house ; that in one of those rooms, a year or two before the finding of the indictment, he had seen liquor, in bottles and decanters, behind a counter, but he could not recollect that he had ever seen drinking done there ; that the only communication between that room and the store was by a door leading into the other shed room, and a door in the wall between that room and the store ; that there was no communication between the bed-room and the room in which he had seen liquor, except through the store ; and that whenever the playing was going on, the store was closed and locked, and also the liquor room. It was in evidence that there was a licensed retailer in Buyckville, the place where the house was in which the gaming was done ; and the witness testified, that the man who owned the liquor in the shed room was not the owner of the store—was not the defendant.

"This was all the evidence in the case. The court charged

the jury, that, if they believed the evidence, they must find the defendant guilty ; to which the defendant excepted."

ELMORE & YANCEY, for the appellant.

M. A. BALDWIN, Attorney General, *contra*.

RICE, C. J.—The charge of the court authorized the jury to find the defendant guilty, without any proof that he had ever played at a game with cards in the county in which the indictment was preferred. For the error of the charge in this respect, the judgment must be reversed, and the cause remanded.—*Brown v. The State*, 27 Ala. Rep. 47.

It is due to the able counsel for the defendant, to say that we have carefully considered the argument made against the exposition of section 3243 of the Code which is contained in *Windham v. The State*, 26 Ala. Rep. 69, and *Brown v. The State*, 27 Ala. 47 ; and that we are unanimous in the opinion, that we ought to adhere to the construction given by those cases to that section.—*State v. Terry*, 4 Dev. & Batt. 186.

Judgment reversed, and cause remanded.

EX PARTE COLE.

[APPLICATION FOR MANDAMUS TO COMPEL DISMISSAL OF ACTION BROUGHT BY NON-RESIDENT WITHOUT GIVING SECURITY FOR COSTS.]

1. *Dismissal on motion of action brought by non-resident without giving security for costs.*—If an action is commenced in the circuit court, by or for the use of a non-resident, and security for the costs is not given previous to the issue of the summons, the defendant may have it dismissed on motion (Code § 2396), although it is brought by plaintiff's wife (§ 2136) after being deserted by him.
2. *Mandamus lies to compel dismissal.*—If the court overrules the defendant's motion to dismiss the action, a *mandamus* will be awarded by the appellate court to compel the dismissal, when no final judgment has been rendered in the cause.
3. *When wife, on desertion by husband, may prosecute or defend actions in his name.* Under section 2136 of the Code, which authorizes "the wife and mother," who has been deserted by her husband, to prosecute or defend, in his name,

any action which he might have prosecuted or defended, it must appear that the wife is also a mother, and the husband a father; and if the husband is a non-resident at the commencement of the suit, security for the costs must be given before the issue of the summons, as in other cases where the plaintiff is a non-resident.

APPLICATION for a *mandamus* to the circuit court of Bibb county, Hon. Geo. D. Shortridge presiding, to compel the dismissal of a certain suit pending in said court, wherein Cicero D. R. Woodruff is plaintiff, and Jared Cole is defendant. The grounds of the application are stated in a bill of exceptions, which is embodied in a transcript of the proceedings had in said cause at the October term, 1855, and made part of the petition. The bill of exceptions states, that when the cause was peremptorily called for trial, "the defendant moved the court to dismiss the suit, on the ground that the plaintiff was a non-resident of this State at the time of the commencement of the suit. On the hearing of this motion, it was admitted by the plaintiff's attorneys, in open court, that the plaintiff was a non-resident at the time the suit was commenced; but they suggested to the court that the suit was brought by the plaintiff's wife, under section 2136 of the Code. It was admitted before the court, on behalf of both parties, that the plaintiff had left his wife, in this State, before said suit was brought, and that she still resided in this State. No other evidence than the said suggestion of plaintiff's attorneys was offered, to show that said suit was brought under said section of the Code. The court, being of opinion that the showing was sufficient to authorize the maintenance of the suit without security for the costs being given, and that the statute requiring security for the costs to be given by non-residents did not apply to this case, overruled the motion to dismiss, and the defendant excepted."

I. W. GARROTT, for the petitioner.

RICE, C. J.—Where an action has been commenced in the circuit court, *by or for the use of* a non-resident, and security for the costs has not been endorsed on the complaint, nor lodged with the clerk, previous to the issue of the summons, the defendant has the right to have it dismissed by that court

on motion.—Code, § 2396 ; Ala. & Tenn. R. R. Co. v. Harris, 25 Ala. R. 232.

When that right is withheld by the refusal of that court to dismiss the action, and no final judgment has been rendered in it, this court may, by *mandamus*, compel that court to dismiss the action. In such case, *mandamus* is the only specific legal remedy adequate to enforce that right.—Etheridge v. Hall, 7 Porter's Rep. 47; Jones, *ex parte*, 1 Ala. Rep. 15; Gordon v. Longest, 16 Peter's Rep. 97.

We need not now decide what would be the proper remedy for a denial of that right, where, after its denial, but at the same term and before an application for a *mandamus* could be made to this court, a final judgment in the action was obtained against the defendant. That question is considered and decided in Gordon v. Longest, *supra*.

But it is argued that, although the first paragraph of this opinion contains a correct general exposition of the provisions of section 2396 of the Code, and although the present action was commenced in the name of a non-resident, and no security for the costs has been given ; yet it is exempted by section 2136 of the Code from the operation of the provisions of section 2396, because it was commenced and is prosecuted at the instance of a wife who had been deserted by her husband, in his name ; and although he is a non-resident, she is not, and never was. This argument makes it necessary to consider the provisions of section 2136, which is in the following words :

“ When a husband and father has deserted his family, the wife and mother may prosecute or defend, in his name, any action which *he* might have prosecuted or defended, and has *the same powers and rights he* might have had.”

It would be a sufficient answer to the argument under consideration, to say that he does not appear to be “ a husband and father,” and that she does not appear to be “ the wife and mother.” But, independent of this, there is another satisfactory answer : Section 2136 does not give her the right to prosecute in his name an action which *he* could not have prosecuted ; nor does it give her greater powers and rights than “ *he*” had. We must, then, put her out of view, until we settle the question, whether *he* can prosecute the present action,

under the facts disclosed by the record. *He* was a non-resident when the action was commenced, and no security for the costs was given before the issue of the summons. Upon these facts, the defendant made a motion to dismiss the action; and section 2396 of the Code declares, that upon such facts and such a motion, the action must be dismissed. We must stand upon the plain words of that section, and hold, that the husband cannot, after such motion and proof, prosecute the action; and, therefore, that the wife, in his name, cannot prosecute it.

We shall, therefore, order a rule to issue to the presiding judge of the circuit court of Bibb county, to show cause why a *mandamus* should not issue to compel that court to dismiss the action.

WARD vs. THE STATE.

[INDICTMENT FOR ASSAULT AND BATTERY.]

1. *Sufficiency of clerk's certificate to transcript on change of venue.*—On change of venue in a criminal case, it is not necessary that each paper, order, &c., found in the transcript, should be mentioned and verified by name in the clerk's certificate. If his certificate states "that the foregoing pages contain a full, true, and complete transcript of the indictment and all papers on file in his office, and of all the entries relating to the case, as found in his office," it is a substantial compliance with the statute (Code, § 3613), and the presumption of law is in favor of the correctness of the proceedings.
2. *Variance between averment and proof as to name of person assaulted.*—A variance between the averment of the indictment and the proof, as to the name of the person assaulted, is immaterial, where the names may be sounded alike without doing any violence to the letters found in the variant orthography; as in the names *Chambless* and *Chambles*.
3. *Admissibility of evidence in extenuation of assault.*—Evidence showing that the person assaulted "was a lazy vagabond, who would not work if he could help it; that money could not be made out of him by legal process; that he had been indebted to the defendant a long time, and would not pay; and that defendant, on the morning of the day on which (in the evening) the assault was committed, had offered him ten dollars per hour if he would work for him in payment of said indebtedness, and he had refused to do it,"

is not admissible for the defendant in mitigation or extenuation of the assault.

4. *Mode of impeaching witness.*—In impeaching a witness, the inquiry is not limited to his general character for truth, but the impeaching witness may be asked as to his general character; Stone, J., *dissenting*.
5. *Competency of impeaching witness.*—A witness who states that he is acquainted with the general character of the impeached witness, although he may never have heard it canvassed, is competent to testify in reference to it.

FROM the Circuit Court of Perry.

Tried before the Hon. GEO. D. SHORTRIDGE.

INDICTMENT against Jefferson Ward, for an assault and battery on one Henry *Chambless*, found at the Fall term, 1853, of the circuit court of Autauga, and removed, on the defendant's application, at the Spring term, 1855, to Perry county. The certificate of the clerk of the court in which the indictment was found, appended to the transcript sent to the court in which the trial was had, is as follows:

"The State of Alabama, } I, John R. McBryde, clerk of
Autauga County. } the circuit court of said county,
do hereby certify, that the foregoing contains a full, true, and complete transcript of the indictment and all papers on file in my office, and of all the entries relating to the case of the State against Jefferson Ward, as found in my office. In testimony whereof, I hereunto set my hand and official seal," &c.

"On the trial," as the bill of exceptions states, "the State having announced itself ready for trial, the defendant objected to going to trial on the transcript sent to the court and exhibited as the transcript upon which he was to be tried, and stated to the court, as the grounds (among others) of his objection, that it did not show that the statements contained therein, in reference to the empaneling of the grand jury therein mentioned, set forth the proceedings of the circuit court of Autauga; and, secondly, that the certificate of the clerk of said circuit court of Autauga was not such as required by the Code. The court overruled the objection, and ruled that the transcript was sufficient to put the defendant on his trial; and the defendant excepted. The defendant then interposed the plea of not guilty, and the trial proceeded.

"One Henry Chambless was then introduced as a witness in behalf of the State, and proved that an assault and battery

was committed on him by the defendant, who stripped and whipped him with a switch. This witness stated, on cross-examination, that his name was Henry Chambless, and that, in spelling it, he doubled the letter s at the end; and witness pronounced his name as it was usually called, showing that both syllables were emphasized about equally. No evidence was offered, showing that his name was ever spelled as shown in the indictment, or that the name as spelled in the indictment was ever pronounced as said witness pronounced his name. Said witness further testified, on cross-examination, that defendant said, immediately after he had whipped him with a switch, that *that* was nothing to what he would give him if he did not pay him what he owed him. Defendant then proposed to prove by said witness, in mitigation, that he had long been indebted to defendant, and had failed to pay him; that money could not be collected out of him by legal process; that defendant had endeavored to procure him to work for him, and he would not; that defendant, on the morning before the whipping in the evening, had offered him ten dollars per hour if he would work for him, to be credited on his indebtedness to defendant, and he had refused to do it; and stated to the court, that he proposed to prove, in connection with this evidence, that said witness was a lazy vagabond, who would not work if he could help it. To the introduction of all this evidence, so proposed to go in mitigation, the solicitor objected, and the court sustained the objection; to which ruling defendant excepted.

"No other evidence than the testimony of said Chambless was offered to prove the allegations of the indictment. The defendant then introduced witnesses to impeach the general character of said Chambless; and when the first impeaching witness was put on the stand, defendant asked him this general question, Are you or not acquainted with the general character of said Chambless? To this question the solicitor objected, and the court sustained the objection, and would not allow said question to be asked or answered by the witness; and to this the defendant excepted. The court then announced its decision to be, that the only question which could properly be asked an impeaching witness, and the only one which it would allow, was, Are you acquainted with the

general character of Henry Chambless for truth and veracity? To this ruling of the court the defendant excepted.

"The solicitor then introduced one Wallace as a witness, to sustain the character of said Chambless; and said Wallace swore, on his direct examination, that he was acquainted with the general character of said Chambless in his neighborhood for truth and veracity, and that he would believe him on oath,—that his said character was good, and that he had known him and had resided in his neighborhood for twenty years. On cross-examination, said witness stated, that he was the son-in-law of said Chambless, that he had never heard a single man say anything either for or against his general character for truth and veracity, but that he had heard some of his neighbors say he was a good citizen. The defendant then moved to exclude from the jury all the evidence of said witness brought out on the examination in chief, as to the character of said Chambless; but the court overruled the motion, and the defendant excepted.

The State then introduced one James Buck as a witness, who testified, that he had never known said Chambless, or his character for truth and veracity in Autauga county, but that he had lived by him, for two years, between 1833 and 1838, near Athens, in Dallas county; that he was then acquainted with his general character in that neighborhood for truth and veracity, and that it was good. This witness stated, on cross-examination, that he had never heard any person in that neighborhood say anything about said Chambless, except one McElroy, who said that he was a good neighbor; but that he had never heard anything against him in that neighborhood, while he remained there. The defendant moved to exclude from the jury all the evidence of this witness, touching the general character of Chambless; but the court overruled the motion, and the defendant excepted.

"The defendant insisted before the court and jury, by his counsel, that he could not be convicted in this case, because the proof did not show that an assault and battery had been committed on the person named in the indictment. But the court charged the jury, among other things, that if they believed the evidence of the witness Chambless, they must find the defendant guilty, although they might believe that his

name was spelled *Chambless*, and not *Chambles*, because both words conveyed the same sound. To this charge the defendant excepted, and asked the court to charge the jury as follows: That, as there was no evidence that the letters *Chambles*, contained in the indictment as the name of the person alleged to have been assaulted, conveyed or gave the same sound as the letters *Chambless*, being the name of the State's witness, then, if they believed that the name of the person assaulted and beaten was *Chambless*, they must find the defendant not guilty. The court refused to give this charge, and the defendant excepted."

No errors are assigned on the record.

I. W. GARROTT, for the appellant:

1. The certificate of the clerk of the circuit court of Autauga county falls short of the requisition of the statute (Code, § 3613), in several particulars. It does not certify, 1st, to the caption of the grand jury; 2dly, to the endorsements on the indictment; 3dly, to the entries relating to the indictment; 4thly, to the undertakings or recognizances of the defendant; 5thly, to the order of removal; 6thly, that anything contained in the transcript is an order or judgment of the circuit court of Autauga; and, 7thly, that anything contained in said transcript appears on the records of said circuit court of Autauga.

2. The evidence offered in mitigation ought not to have been excluded from the jury. It is conceded that the facts showed no justification of the assault and battery, but they should have been allowed to go to the jury, in order that, in estimating the fine, they might consider the provocation which incited the defendant to the commission of the unlawful act.

3. The ruling of the court, in reference to the question to be propounded to an impeaching witness, was erroneous.—1 Greenleaf on Evidence, § 461, note 3; *Hume v. Scott*, 3 A. K. Mar. 261; *People v. Mather*, 4 Wend. 257; *State v. Boswell*, 2 Dev. L. R. 210; 2 Phillipps on Evidence, 432; *State v. Stallings*, 2 Hayw. 300; *Bakeman v. Rose*, 18 Wend. 150; *Dave v. The State*, 22 Ala. 36; *Sorrelle v. Craig*, 9 *ib.* 538-40.

4. The witness Buck ought not to have been allowed to

testify to the character of Chambless. He did not come from the neighborhood of Chambless, and therefore could not speak of the estimate in which his neighbors held him; nor did he know the general character of Chambless, of which (as he testified) he had never heard any one speak.

5. There was no evidence to show how the name *Chambless*, as spelt in the indictment, was pronounced; but there was evidence to show the proper pronunciation of *Chambless*, the name of the witness. If it be conceded that the court may take judicial notice of the sound of certain letters constituting a particular word, it certainly cannot do more than give to the letters the sound commonly given to them; it has not the arbitrary right to give them such a sound as may be necessary to make out a case.—*Kirk v. Suttle*, 6 Ala. 679 (681); 2 *Star-kie on Evidence*, 1588, and note; *Turvil v. Aynsworth*, 2 *Stra.* 787; 10 *East*, 83; *Gordon v. Austin*, 4 *Term R.* 326.

M. A. BALDWIN, Attorney General, *contra*:

1. The certificate of the clerk of the circuit court of *Autauga*, appended to the transcript on which the defendant was tried, is a substantial compliance with the requirements of the statute; and the court to which the trial was removed was bound to presume all things regular up to the order for the change of venue.—*The State v. Williams*, 3 *Stew.* 463; *The State v. Greenwood*, 5 *Port.* 483.

2. *Chambless* and *Chambles* are *idem sonans*.—*Gresham v. Walker*, 10 Ala. 370; 2 *Russell on Crimes*, 797.

3. In laying the predicate to impeach a witness, the proper question to be asked is, Are you acquainted with his general character for truth and veracity?—*Sorrelle v. Craig*, 9 Ala. 540; *Hadjo v. Gooden*, 13 *ib.* 718; *Nugent v. The State*, 18 *ib.* 526; *United States v. Vansickle*, 2 *McLean*, 219; *Carter v. Cavanaugh*, 1 *Iowa R.* 171; *Frye v. Illinois Bank*, 11 *Illinois R.* 379; *Uhl v. Commonwealth*, 6 *Grattan*, 706; *Clark v. Bailey*, 2 *Strob. Eq.* 143; *Gilbert v. Sheldon*, 13 *Barb.* 623; *Bates v. Barber*, 4 *Cushing's (Mass.) R.* 107; *Bucklin v. The State*, 20 *Ohio R.* 18; *Boswell v. Blackman*, 12 *Geo. Dec.* 590.

4. To acquire a knowledge of a person's general character, it is not necessary to hear any one speak of his disposition to tell the truth; nor is the impeaching witness confined to time

and place as to his knowledge of the character of the impeached witness.—*Hadjo v. Gooden*, 13 Ala. 722; *Dave v. The State*, 22 *ib.* 23; *Sleeper v. Vanmiddlesworth*, 4 Denio, 431.

STONE, J.—Section 3613 of the Code defines specifically what the transcript shall contain, when a change of venue shall be ordered in a criminal case. The transcript which was certified from the circuit court of Autauga, substantially conforms to the requirements of said section. We do not understand the counsel for the appellant as contending that any thing appears to be omitted in the transcript. The argument is, that neither the transcript nor certificate shows that said proceedings were of record in Autauga circuit court; and that the certificate is itself defective, in failing to mention and verify by name the contents of the transcript, viz., the caption of the grand jury, the indictment, &c.

The section of the Code under consideration defines the duty of the clerk in the given case. If the transcript do not contain copies of all the papers, entries, and orders that are material to the cause, it will, to that extent, be defective. There is nothing in the language of the Code, which requires the clerk to depart from the usual rule, and to mention in his certificate each paper, order, &c., that may be found in the transcript. We think the clerk's certificate substantially meets the requirements of the law. He certifies that "the transcript contains a full, true, and complete transcript of the indictment, and all papers on file in his office, and of all the entries relating to the case of the State against Jefferson Ward, as found in his office." The *entries* could have been none other than the orders of court made in the particular cause; and those orders could only be found, or *exist*, on the records of the court.

These proceedings were had in a court of general jurisdiction; the certificate was given by a sworn officer, and the presumption of law is in favor of their correctness.—*Case of Williams*, 3 Stew. 454; *Greenwood's case*, 5 Por. 474; *Phil. on Ev.*, Cow. & Hill's Notes, part 1, p. 296.

2. An argument has been predicated on an alleged variance between the name given in the indictment, and the real name of the person on whom the assault is charged to have been

made. In this connection, the name is matter of description, or identity. The books abound in hair-breadth distinctions; but we apprehend the true rule to be, that if the names may be sounded alike, without doing violence to the power of the letters found in the variant orthography, then the variance is immaterial. Much greater differences than that which appears in the present record, have been held unimportant.—*Gresham v. Walker*, 10 Ala. R. 370; 2 Russell on Crimes, 715; 2 Taunt. 401.

In the pronounciation of proper names, far greater latitude is indulged than in any other description of words. To hold the pleader to a literal compliance in every case, would greatly obstruct, while it cannot promote, the ends of justice.

A class of cases may be found in the books, where the law requires a stricter conformity of the allegations to the proof. In them, an instrument in writing, or a record, is attempted to be set out. Of this class are the cases collected in Starkie on Evidence, vol. 3, p. 1587, and *Gordon v. Austin*, 4 Term. But they do not impair the soundness of the rule above enunciated.

3. The testimony offered, as it is said, in mitigation, was properly excluded. It related to a different transaction, and to a conversation at a different time, and was therefore too remote to be given in evidence in this case. To allow this testimony would require the jury to try, not only the guilt or innocence of Ward, but also the habits and solvency of Chambless, and various other questions. Besides, it is by no means certain that the testimony offered would extenuate or mitigate the offence, which the recitals in the bill of exceptions tend to prove.

4. The question raised on the *form* of the preliminary question in the introduction of impeaching testimony is not free from difficulty, whether we consult principle or authority. We acknowledge the force of the argument, that human vices are social in their character, and that one who has blunted his moral sensibilities by crimes, or frauds of scarcely less turpitude, should not receive the same credit in a court of justice as a purely virtuous man. It taxes credulity very far to suppose that veracity can stand unhurt amid the general ruin of moral principle. On this point there is much force in

the language of Ch. J. Collier, in the opinion in *Sorrelle v. Craig*, 9 A. R. 534. On the other hand, the inquiry may reasonably arise, what degree of immorality shall constitute a basis of impeachment? can any correct scale be laid down? can a safe rule be established?

In the authorities on this point there is an irreconcilable conflict. In my opinion, both the weight and numbers are on the side which confines the investigation to character for truth and veracity. See them collected on the briefs of counsel. Our own court, in the case of *Sorrelle v. Craig*, *supra*, carefully abstain from adopting the more general form of question, though the writer of the opinion indicates his approval of it. In the case of *Nugent*, 18 A. R. 321, C. J. Dargan gives the more limited form as the proper question. The question was not directly raised by the record in that case; but in support of the rule thus laid down, the opinion cites several decisions of sister States, settling the question as stated. The question may then be regarded as not authentically settled in this State. A rule of practice that is drawn in question as frequently as this must continue to be, ought to be defined and understood.

The opinion of Senator Tracy, in the case of *Bakeman v. Rose*, 18 Wend. 146, offers, perhaps, the best reasons in favor of the more general inquiry. The case of *U. S. v. Vansickle*, 2 McLean, 219, is a forcible argument in favor of the more restricted form of question. While there is much plausibility in the argument of Mr. Tracy, I think he laid down the rule too broadly. To permit a knowledge of the general *moral* character of a witness to be made the grounds of evidence impeaching his credibility, is certainly a wide departure from the wholesome general rule, that witnesses depose to facts, and the jury draws the conclusions.

The question in the restricted form, viz., "From your knowledge of his general character for truth and veracity, would you believe him on oath?" is one of difficult solution to a majority of witnesses. Suppose the question be propounded in the general form, "Are you acquainted with the general *moral* character of the witness who has deposed?" "Is it good or bad?" These questions being answered, suppose the further question be put, viz., "From your knowledge

of his general *moral* character, would you believe him on oath?" Is not the solution rendered much more difficult?

The proper answer will include, first, the ascertainment of the existence of general bad moral character; secondly, the conclusion or inference from the existence of that *general bad moral character*, that love of truth had been weakened or destroyed thereby; and thirdly, the conclusion or inference from *this*, that the witness sought to be impeached is unworthy of credit on his oath. And this last remote inference or conclusion is thus given to the jury as a *premise*, from which that body is to draw an inference or conclusion. This operation of the mind would require a solution of some subtle and debatable questions in casuistry; a solution which ought not to be expected or demanded of witnesses, a majority of whom are unaccustomed to such investigation.

What is bad moral character? To what immoralities must a witness be addicted, to justify an inference adverse to his veracity? The general question lays down no rule; shall a question so important be left to the judgment or caprice of each impeaching witness? The standard would be uncertain, dependent on the moral organism of each bystander who might perchance be called to the witness stand. General dissoluteness might satisfy one mind; professional gambling a second; gross frauds in pecuniary transactions a third; while a fourth might withhold this severe judgment, until the attacked witness had blackened his reputation by crimes of deepest dye.

The difficulties would not end here. The party whose witness was impeached, would have the clear right, on cross-examination, to learn the grounds of the opinion deposed to. The grounds of the different witnesses might be as multiform as human depravity is; and each separate ground would present an issue for testimony, for argument of counsel, and for deliberation and decision by the jury. This would be in direct antagonism to that sound principle, which forbids the presentation of outside issues, because they tend to embarrass the deliberations of the jury.

I feel fully authorized, both on principle and authority, to lay down the rule, that inquiries on this subject ought to be limited to the *general character for truth and veracity*. This

rule preserves the harmonies of the law on all subjects, where character can become the subject of proof. For instance, in prosecutions imputing personal violence, the accused may prove his general character as a peaceable citizen; in charges of larceny, his general character for honesty, &c.

An argument may be thought to be predicable on the language of the elementary writers. Starkie does not touch the question. Phillipps (vol. 1, old edition, p. 212), as I understand his language, simply lays down the rule, that *general* character can only be proven, in contradistinction to *particular facts*, or *parts* of character. Swift (p. 143) expressly limits the inquiry to general character for *truth*. Greenleaf (vol. 1, § 461) says, a witness may be impeached "by general evidence affecting his credit for *veracity*." The two authors last referred to are in favor of the restricted inquiry. None of the elementary books use the terms good or bad *moral* character, or other equipollent words.

If the question were an open one, the writer of this opinion would be disposed to limit the direct examination of an impeaching witness, first, to his knowledge of the general character for veracity of the impeached witness; and secondly, whether that character was good or bad. Then, let the jury, from this predicate, draw the conclusion whether the witness ought to be believed or not. Of course I would not inderdict legitimate cross-examination. But the rule has prevailed too long to be now disturbed, that the witness may be asked whether, from the general character of the impeached witness for truth, he, the impeaching witness, would believe him on oath in a court of justice.

Applying these rules to the case under consideration, it is my opinion, the circuit court did not err in refusing to allow the question presented by the bill of exceptions. The question which the presiding judge prescribed as "the only one he would allow," though a legal question, was not the only one the accused had the right to propound. It was clearly his right to vary the phraseology, or sever the numbers of the sentence, so as to bring the subject home to the comprehension of the witness. Moreover, it was his privilege to extend the inquiry, after ascertaining his witness' knowledge of the general character for truth, so as to learn whether that

character was good or bad, and whether from that general character he would believe him on oath. But a majority of the court is in favor of the more general inquiry.

5. The court below correctly refused to exclude Buck's testimony. If the impeaching or sustaining witness answers the preliminary question affirmatively, it does not destroy his competency though he may never have heard the character of the witness he speaks of canvassed.—*Hadjo v. Gooden*, 13 Ala. 722; *Dave v. The State*, 22 Ala. 23.

The judgment of the circuit court is reversed, and the cause remanded.

RICE, C. J.—We all agree that the judgment of the circuit court should be reversed, and that, in assailing the credit of a witness, an inquiry as to his general character for *truth* is proper. We do not, however, agree upon the question, whether the law *restricts* the inquiry to the general character for *truth*.

My opinion is, that the law makes no such restriction, but allows a broader inquiry into general character. If the most approved writers upon evidence are to be relied on, it is clear that such restriction never formed a part of the English or common law.—1 Phil. on Ev. (ed. of 1820), 212; 2 Phil. on Ev. (ed. of 1839), 768-771; Starkie on Ev. 146; Norris' Peake (6th edition), 107; 1 Greenlf. on Ev. § 461, and notes; *Bakeman v. Rose*, 18 Wend. R. 146; *Sorrelle v. Craig*, 9 Ala. R. 534; *State v. Boswell*, 2 Dev. Rep. 209; *The People v. Mather*, 4 Wend. R. 257; *Anon.*, 1 Hill's (So. Ca.) R. 251; *Hume v. Scott*, 3 Marsh. R. 261; *Noel v. Dickey*, 3 Bibb, 268; *Blue v. Kibley*, 1 Monroe, 195; *Wike v. Lightner*, 11 Serg. & Rawle, 199.

I am aware that there are many decided cases in the American courts, which favor the restriction. But there are many American cases opposed to it. The best writers upon evidence are opposed to it. The dictates of natural justice are opposed to it. It is certainly unjust, that a witness who has made no general character as to *truth*, but whose general character is notoriously bad and infamous, should be protected by any such restriction as is now under discussion, and be

thereby enabled to obtain equal credit with a man of unsullied general character.

The authorities herein above cited satisfy me, beyond reasonable doubt, that the cases which decide in favor of the restriction are not to be regarded as law, and ought not to be followed.

WALKER, J.—I concur in the opinion of the Chief Justice.

SATTERWHITE vs. THE STATE.

[APPEAL FROM JUDGMENT OF CONVICTION UNDER BASTARDY ACT.]

1. *Form of security for costs.*—From a judgment of the circuit court, in a proceeding under the bastardy act, an appeal may be taken (Code, § 3821) by merely giving security for the costs; and the security may be either a bond, or a simple acknowledgment in writing.
2. *Sufficiency of appeal bond as security for costs.*—When an appeal bond is designed to operate merely as security for the costs, and not to supersede the judgment, although a misdescription of the judgment would be fatal, yet a mere omission to recite in the bond the several days on which the judgment required the respective sums to be paid would not have that effect, if the judgment were otherwise correctly described, by its aggregate amount, names of parties, term of the court when rendered, &c.; such an omission may be supplied by a comparison of the bond with the clerk's certificate, or with other parts of the record.
3. *Sufficiency of evidence to authorize conviction.*—It is not error to refuse to instruct the jury, at the defendant's request, "that they ought to acquit unless the proof showed beyond a reasonable doubt that he was guilty"; but it is erroneous to instruct them, "that, if the State produced a preponderance of evidence, they might upon such preponderance of proof find the defendant guilty."
4. *Examination of parties as witnesses.*—Where the mother and the putative father of the child, both being made witnesses by the statute (Code, § 3807), are examined on the trial, their testimony must be weighed by the jury like that of other witnesses.

APPEAL from the Circuit Court of Macon.

Tried before the Hon. ROBERT DOUGHERTY.

WILLIAM SATTERWHITE, the appellant, was arrested under a warrant issued by a justice of the peace, on the affidavit of Mary Ann Hill that he was the father of a bastard child with which she was then pregnant, and which was afterwards born in December, 1854. He gave bond for his appearance before the circuit court to answer the charge; and on the trial, which was had at the October term, 1855, an issue being made up as directed by the statute, the jury found that "the defendant is the real father of the said child."

On the trial, the mother of the child was introduced as a witness for the State, and testified, "that the defendant was the father of the child, and that she had never had any connection with any other person." On the other hand, the defendant, who was also examined, "swore that he had never on any occasion had connection with the mother of said child, and positively contradicted her in every particular sworn to by her showing a criminal connection." Witnesses were examined by each party for the purpose of contradicting the other's testimony; and each was thus contradicted in several particulars which it is unnecessary to notice. "The State introduced witnesses to prove, in rebuttal, the good character of the mother of said child for truth and veracity; and the defendant proposed to prove by them, on cross-examination, that his character for truth and veracity was known to them, and that it was good. The court refused to permit the defendant to prove his character on cross-examination of said witnesses, but ruled that he might make the witnesses his own, and then prove his character by them. This the defendant afterwards did, and excepted to this ruling.

"The court charged the jury, that the mother of the child and the defendant being both made witnesses by the statute, they must weigh their testimony as that of other witnesses; and to this charge the defendant excepted.

"The defendant asked the court to charge the jury, that they ought to acquit unless the proof showed beyond a reasonable doubt that he was guilty. The court refused to give this charge, and instructed the jury, that if the State produced a preponderance of evidence, they might upon such preponderance of proof find the defendant guilty. The de-

fendant excepted to this charge, and to the refusal to give the charge asked."

The charges given, with the refusal to give the charge requested, are now assigned for error.

On the part of the State, a motion was submitted to dismiss the appeal for want of security for costs, founded on a variance between the judgment rendered in the cause and the judgment described in the appeal bond. The judgment of the court was as follows: "It is therefore considered by the court, that the defendant pay the sum of \$45 a year, for ten years, for the support and education of said bastard child, and that he enter into bond, with security, in the sum of \$1,000, payable to the State of Alabama, and conditioned to pay said sum of \$45 a year, on the first Monday in January in each year, for ten years, to the judge of probate of said county of Macon, for the support and education of said child; and it is further considered by the court, that the State of Alabama recover of the defendant the sum of \$351 41, the costs of this suit." In his final certificate appended to the transcript, the clerk certifies, "that a judgment was rendered, at the Fall term of the circuit court of said county, in favor of the State of Alabama, against William Satterwhite, for the sum of \$450; and that an appeal was taken by the said William Satterwhite, and bond given by him with Anderson Satterwhite as his surety, dated the third day of November, 1855." An appeal bond is copied in the transcript, in the condition of which it is recited, "that the said State of Alabama has obtained a judgment against the said William Satterwhite, in the circuit court of said county, at its Fall term, 1855, for the sum of \$450."

WILLIS & WILLIAMS, and THOS. H. WATTS, for the appellant:

1. On the motion to dismiss the appeal: The clerk's certificate shows that an appeal was taken within the time prescribed by law, and that security for the costs was given; and this is sufficient to give this court jurisdiction. In such cases as this, no *supersedeas* can be obtained, and therefore no bond is necessary; a simple acknowledgment in writing is all that is required.—Riddle v. Hanna, 25 Ala. 484; Spencer v. Thompson, 24 *ib.* 512; Hall v. Wallace, 25 *ib.* 438. The bond copied

in the record, though somewhat informal, does not affect the validity of the appeal, since the clerk's certificate shows a compliance with all the requisitions of the statute.

2. That the court erred in its charge to the jury, see *Mays v. Williams*, 27 Ala. 267.

CLOPTON & LIGON, *contra*, made the following points ;

1. The appeal ought to be dismissed.—*Williams v. The State*, 26 Ala. 85.

2. By the statute, both the prosecutrix and the defendant are entitled to their oaths. They stand as other witnesses, subject to be contradicted, impeached, or corroborated by other testimony; and the testimony of neither is conclusive. *Judson v. Blanchard*, 4 Conn. 565; *Howard v. Packard*, 17 Pick. 380; *The State v. Coatney*, 8 Yerger, 200; 2 Archbold's Criminal Pleadings, 299.

3. The charge requested by the defendant, and the charge given by the court in lieu of it, present the question, whether proceedings under the bastardy statute are civil or criminal. That such proceedings are substantially civil suits, and are governed by the rules which regulate civil suits, though some of their forms are borrowed from the criminal law, see the following cases :—*Walker v. The State*, 6 Blackf. 2; *Marston v. Jenness*, 11 N. H. 156; *Robie v. McNiece*, 7 Vermont, 422; *Hinman v. Taylor*, 2 Conn. 360; *Hill v. Wells*, 6 Pick. 104; *Trawick v. Davis*, 4 Ala. 328; *Robinson v. Crenshaw*, 2 Stew. & P. 276.

RICE, C. J.—From a judgment of the circuit court in a proceeding in bastardy, an appeal to the supreme court may be taken, by merely giving security for the costs of the appeal, to be approved by the clerk of the circuit court.—Code, §3821. Such security is not required to be in any prescribed form. It may be given by bond, or by a simple acknowledgment in writing. Whether it be in one form or another, if it be security for the costs of the appeal, and is approved by the clerk of the circuit court, it is sufficient.—*Riddle v. Hanna*, 25 Ala. R. 484; *Spencer v. Thompson*, 24 Ala. R. 512.

In *Williams v. The State*, 26 Ala. Rep. 86, the bond first given as a security for the costs of the appeal was held fatally

defective, because there was a *mis-recital* in it of the respective days on which the judgment required the defendant to pay the respective sums adjudged against him. Those days, *being inserted in the bond*, became material. The recital, as to them, constituted a part of the contract. That recital was false, and, therefore, there was a fatal *variance*—actual *repugnancy*, between the judgment described in the bond and the judgment rendered by the circuit court.—The People v. Monroe Common Pleas, 3 Wend. R. 426; Weissenger & Crook, *ex parte*, 7 Ala. R. 710; Flournoy v. Mims, 17 Ala. R. 36.

But the mere *omission* of any recital in that bond, as to the days on which the judgment required the respective sums to be paid, would not have had the effect which the *mis-recital* had. If the bond had correctly recited the aggregate of the respective sums which the judgment required the defendant to pay, the parties to the judgment, and the term of the court at which it was rendered, and had contained what, in legal contemplation, amounted to an undertaking for the costs of the appeal, it would not have been held defective as an appeal bond or as security for the costs of the appeal. If there had been simply such *omission* of a recital as to those days, no *repugnancy* would have been made to appear, and there would have been no fatal variance.—The People v. Orleans Common Pleas, 2 Wend. R. 292; Meredith v. Richardson, 10 Ala. Rep. 828; see, also, authorities cited *supra*.

The same accuracy and fullness of description of the judgment are not required in a bond which is not to operate as a *supersedeas*, but merely as security for the costs of an appeal, as is required in a forthcoming bond, to give to it, on a return of forfeited, the effect of a statutory judgment authorizing the immediate issuance of execution against all the obligors. To give *such effect* to a forthcoming bond, under our statute, it is essential that the description of the execution in it should be true and perfect. An *omission* to describe the execution fully may as effectually destroy *such effect* of such a bond as actual *misdescription* of the execution, although the bond may still be valid as a common-law obligation. The principle on which this position rests is, that every such summary judgment, or judgment in such summary proceeding, must be full and perfect in itself, in order to support an execution issued

under it.—Tombeckbee Bank v. Strong's Ex'r, 1 Stew. & Por. 187; Nicholson v. Burke, 15 Ala. Rep. 353; see, also, cases cited *supra*.

A bond, executed in such a case as the present, and designed to operate as mere security for the costs of the appeal, is to be construed in this court as it would or might be in the office of the circuit clerk. There, it might be compared with the entries, papers, and proceedings on file and of record in the particular case in which it was in fact given, and its application to that case shown by such comparison. If this were not the law, no valid appeal could ever be taken, by merely giving security for the costs of the appeal, where two or more judgments for the same amount were rendered between the same parties, by the same court, on the same day. It is conceded that "*parol evidence* can neither bend the bond to the record, nor the record to the bond," and that neither the bond nor the record can be contradicted by *parol evidence*. But the operation of the bond can be assisted and directed by the record.—Rakes v. Pope, 7 Ala. Rep. 161. A comparison of the bond with the record is allowable for that purpose. When such comparison is made in this court, the certificate of the clerk attached to the transcript sent here constitutes part of the record (Carey v. McDougald, 25 Ala. Rep. 109); and whenever such comparison would supply the alleged defects of the bond, and show the application of the bond to the particular case, and the bond in legal contemplation amounts to an undertaking for the costs of the appeal, it ought to be supported as a good appeal bond, or as security for the costs of the appeal, upon the maxim, "*id certum est quod certum reddi potest*."—Weissinger & Crook, *ex parte*, 7 Ala. R. 710; Summer v. Glancey, 3 Blackf. Rep. 361; Gayle v. Hudson, 10 Ala. Rep. 116; Meredith v. Richardson, 10 Ala. Rep. 828, and cases there cited; Chapel v. Congdon, 18 Pick. Rep. 257.

Without saying more on this point, we are satisfied that the bond in the present case, under the principles above stated, amounts to security for costs of the appeal. The motion to dismiss the appeal must therefore be overruled.

The court charged the jury, that if the State produced a preponderance of testimony, they might *upon such preponderance* of proof find the defendant guilty. To this charge the

defendant excepted, Upon the authority of *Mays v. Williams*, 27 Ala. R. 267, we hold this charge to be erroneous. See, also, *Brandon v. Cabiness*, 10 Ala. Rep. 155 (3d head note.)

There was no error in the other charge given by the court, nor in refusing the charge asked by the defendant. This proceeding is not a criminal case.—*State v. Pate*, Busbee's Rep. 244.

The question raised on the offer of defendant to prove his character, on cross-examination of the witness introduced against him, may not arise on another trial, and we decline to consider it.

For the error above pointed out, the judgment is reversed, and the cause remanded.

MARTIN AND FLINN vs. THE STATE.

[INDICTMENT FOR ARSON.]

1. *Ownership of property burned must be alleged.*—A count in an indictment for arson, which does not charge the ownership of the property alleged to have been burned, is substantially defective on motion in arrest of judgment.
2. *Admissibility of evidence of previous attempt to procure burning.*—The fact that the defendant, some five or six months before the burning charged in the indictment, requested another person (witness) to burn the house, is admissible evidence against him.
3. *Admissibility of evidence showing defendant's connection with attempts to suppress testimony of witness for prosecution.*—Promises and threats made by a third person, after indictment found, to a witness for the prosecution who had been before the grand jury, to induce him to leave the State, to the effect that, if he would leave, defendant "would pay him \$200 or \$300, and would give him money to set up business in New Orleans, and, if he refused, would kill him, or get some one else to kill him," are not admissible evidence against the defendant, unless his connection with the person by whom they were made is otherwise shown; but the facts that the witness, at the time appointed for his departure with the person (one E.) who made the representations, "passed by defendant's house, and saw defendant standing in his door,—that defendant waived his hand to him to pass on by, which he did for a short distance, and waited a short time there, when E. came out of the house, with defendant's horse and buggy, and he saw defendant give him

some \$25 for him," and that E. then carried him away with the horse and buggy, are competent evidence to be weighed by the jury.

4. *Knowledge of insurance necessary to establish intent to charge insurer.*—To justify a conviction for arson, under a count charging the burning to have been done "with the intent to charge or injure the insurance company," the jury must be satisfied from the evidence that the defendant had knowledge of the insurance.
5. *Corroborating evidence must tend to show guilt.*—The testimony of a witness for the prosecution, who is shown to be unworthy of credit, is not sufficient to justify a conviction, with corroborating evidence; and such corroborating evidence, to avail anything, must be of a fact tending to show the guilt of one or both of the defendants.
6. *Verdict of guilty on single count.*—Where an indictment contains several counts, a verdict of "guilty as charged in the second count" is equivalent to an acquittal as to the other counts.

FROM the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

INDICTMENT FOR ARSON against Francis Martin and Michael Flinn, containing four counts. The first count charged, that the defendants "willfully set fire to, or burned, in the night, a dwelling-house, or house adjoining thereto, in which dwelling-house there was at the time a human being"; the second, that they "willfully burned certain property, to-wit, the bar, and shelves, and closets, and bar fixtures in a building called 'The Constitution,' together with the wines, brandies, liquors, and stores in said building, which said bar, closets, shelves, fixtures, wines, liquors and stores were at the time insured against fire by the 'Mobile Navigation and Mutual Insurance Company,' with intent to charge or injure said Mobile Navigation and Mutual Insurance Company"; the third, that "they willfully set fire to, or burned, a store-house called 'The Constitution,' the property of Lyman Gibbons, said house being at the time of the value of \$1,000"; and the fourth, that they "willfully set fire to, or burned, in the night time, an inhabited dwelling-house, without any human being therein at the time." The defendants, before the trial commenced, moved for a severance; but the court refused to grant it. They then moved "that the solicitor be required to elect on which count or counts in the indictment he would proceed, and that he be not permitted to try on all together." These motions were severally overruled, and the defendants excepted.

“On motion of the solicitor,” as appears from the bill of exceptions, “at the commencement of the trial, it was ordered that the witnesses on both sides be put under the rule requiring all the rest, when any one was examined, to be absent: It was then proved, that the coffee-house called ‘The Constitution,’ a place for the sale of liquors, cigars, &c., (the lower room, or ground story, extending from Front street, near the wharfs of the city, to Commerce street, of a building at the intersection of these streets with St. Louis street, in one of the most frequented parts of the city of Mobile,) was, on the 4th January, 1853, kept by Joseph Mavro & Co., who then took out a policy of insurance of the Mobile Navigation and Mutual Insurance Company, on the bar, fixtures, counters, shelves, and other furniture of said coffee-house, and on the stock of liquors or merchandise therein, to the amount of \$2,500, for the space of one year; that said Mavro & Co., on the 28th March, 1853, sold out all their interest and stock in said coffee-house to one Marigoni, and, with the assent of the company, assigned to him said policy of insurance; that said Marigoni, on the 4th January, 1854, renewed said policy of insurance, for the space of another year, and on the 5th July, 1854, sold out his stock and interest in the coffee-house to the defendant Martin, and, with the assent of the company, assigned to him the policy thus renewed; that said Martin, on the 4th January, 1855, on being informed by an agent of the company, as is customary, that the policy was about to expire, renewed the same (which had thus been transferred to him) for another year, by paying the premium, \$33. 50.

“It was further proved, that the fire for which the indictment was preferred, was discovered in this coffee-house, about 9 o’clock at night, on Saturday, the 28th April, 1855, from ten to twenty minutes after defendant Flinn, who attended the bar therein in the service of Martin, had closed the house and left it; that Flinn had hastened the departure of the persons who were there, so that he could close the room, and that he had no cigars in the bar-room; that the fire was caused by combustibles of a highly inflammable nature—to-wit, light-wood, cotton, and phosphorus, which had been put in several places behind the bar (or counter), in the decanter closets, and under the stairway, which extended

from Front and Commerce streets respectively to the story above; that there was property on the premises, belonging to Martin, to the amount of about \$500; that the liquors and other things found on Monday morning after the fire in the coffee-house, (which was thronged by people during the fire, and was afterwards taken possession of by the police,) were of much less value than the amount of the policy of insurance; that the coffee-house had two fronts, one on Front street, and the other on Commerce street, which, by means of the doors of which they were composed, were daily thrown entirely open for customers; and that there were two other doors in the end on St. Louis street, which were also sometimes (but not usually) thrown open, and were not shown to have been open recently. There was no proof, on either side, as to whether Martin had been that day at said coffee-house.

"It was proved, also, that there was published in the newspapers of Mobile, before and at the time of the fire, a reward of \$1,200, to be paid by the insurance companies, for the discovery and conviction of any white person of the offence of arson in the city, from the date of the advertisement (April 6th, 1855) to the 1st November following. Capt. H. R. Johnston, a steamboat captain, a witness introduced by the State, testified that he had arrived, with many other persons, on a steamboat which had just come down the river, at the wharf opposite said coffee-house, and within four hundred feet thereof, shortly before the fire was discovered; that when near the coffee-house, on his way out home, he was arrested by the cry of fire, and helped to break open the doors and extinguish it; that he found all the doors were securely fastened; that in passing Martin's house, between 9 and 10 o'clock, on his way homeward, he saw Martin, at his residence about a mile from said coffee-house, in his shirt-sleeves, putting the blinds up to his windows, and informed him and his wife of the fire, that it was extinguished, and that the house was full of people; and that he left Martin going after his horse, to go down to said coffee-house.

"The State then introduced as a witness one Carr, a watchman of the city, who testified that, having been the first to arrest Martin, he expected part of the aforesaid reward, if he was convicted. After some evidence about the fire, he tes-

tified that he saw Martin, about 10 o'clock, come riding to said coffee-house; that Martin, when he came up, said to him, 'What is this? Where is my clerk? I came down to see a steamboat' (or, it might have been, some person on a steamboat) 'and find my house broken open!' On cross-examination, this witness said, that Martin was a foreigner and spoke English badly, but not so badly but that he understood him; that Martin did not say that he had come down to see about the fire,—that a steamboat captain had come by his house and told him of it; and he stated, on further cross-examination, that George A. Cleaveland, a justice of the peace, was present at this conversation with Martin. One Calloway, another watchman, was then introduced by the State, who said that he also expected a part of the reward if the defendants were convicted, and testified that he, too, was present when Martin came riding up, about 9½ o'clock; that Martin's first words were, 'Good evening—What's the matter here?' that Martin was told, in answer, that his house had been a-fire; and that he said he 'had come down to see a steamboat captain,' and asked where his clerk was, &c. Witness said, on cross-examination, that Martin spoke English very badly, and with a rapid utterance,—that it was very hard to understand him; that he might have said, he 'had come down to see about the fire,—a steamboat captain had told him of it;' and that he thought he did say something about 'Capt. Johnson.' But, on re-examination in chief, witness said that he did not understand or recollect that Martin said he had been told about the fire and had come down to see about it.

"The State then introduced and examined Jose Cortez, and one Rivers, whose testimony is hereinafter again referred to. The evidence on the part of the State being through, the defendant Martin introduced the said George A. Cleaveland as a witness in regard to his conversation with Carr and Calloway; to which the solicitor objected, because said Cleaveland had not been put under the rule, but had been in the court-room, and might have heard the testimony of Carr and Calloway, or might have been informed what the testimony was. The defendants offered to prove by said Cleaveland, that he had not heard any of the testimony, but had come, after being summoned, to see if he could not be excused from

attending; but the court said that the witness had been in the court-room, and in the door of it, for some time before he was called, and sustained the objection; to which ruling the defendants excepted." The defendants then offered to introduce C. F. Moulton for the same purpose, but the court sustained an objection to him for the same reason, and defendants excepted. "Afterwards, in the argument before the jury, the solicitor told them that Martin's declarations to Carr and Calloway were such as Martin's counsel had proposed to show they were by Cleaveland and Moulton, and admitted that such was the language of Martin to the witnesses."

"The said Jose Cortez, a witness for the State, testified, against defendants' objection, that he had been in the service of Martin, who was a manufacturer of cigars, at his residence, to make cigars for him; that Martin asked him, on Monday, the 21st November, if he would not do him a favor; that, on being asked what it was, Martin said he wanted him to burn 'The Constitution,' as it was doing a dull business, and had been a bad season on him; that he had not made as much money as he expected, that he would make money by burning his stock, &c., and getting the insurance money; that witness refused to do it, and told him he had better get somebody else. All this evidence was objected to by defendants, as irrelevant, and the objection overruled by the court; to which ruling of the court defendants excepted.

"Said Cortez was then interrogated by the solicitor, as to the circumstances of his going away, or being taken away by one Estapa, out of the State, since the finding of the indictment. The defendants, by their counsel, objected to any such statement, as being irrelevant and otherwise incompetent or illegal; when the solicitor stated, that he proposed to show by the witness that Martin was connected with it, and that Martin's object was to suppress or remove the testimony of Cortez. The court overruled the objection, and the defendants excepted to its ruling. The witness then stated, that a few days after the finding of the indictment, he having been called before the grand jury as a witness, one Estapa, another Spaniard, (witness and Martin both being Spaniards,) called at his house every night for a week, and persuaded him to go away and leave the State,—that if he would go away, Martin would

pay him \$200 or \$300, and that they would give him money to set up the cigar business in New Orleans, and would give his wife some money here, and that, if he did not go away, Martin would kill him, or get somebody to do it. Witness said that he considered his life in danger, and at last agreed to go with him, and to start from Estapa's house; that he went along the street by Martin's house, at the time appointed, and saw Martin standing in the door, who waived his hand to him to pass on by, which he did a short distance, and waited a short time there, when Estapa came out of Martin's house, with Martin's horse and buggy, and he saw Martin give Estapa some \$25 for him; that he went off with Estapa, in the buggy, as far as Estapa's house that evening at Spring Hill, and the next morning to Pascagoula, where Estapa left him; that he went from that place to New Orleans, where he was found in a few days by David Walker, a policeman of Mobile, who brought him back to Mobile, witness having promised to come back with him if Walker would get him out of the guard-house in New Orleans, where witness was confined; and that being required by the court, at the instance of the State, to give bail in the sum of \$1,000 for his appearance as a witness in this case, he was unable to do so, and had been therefore up to this time confined in jail. To all the foregoing testimony, his conversations with Estapa, and Estapa's alleged representations to him, defendants objected; but the court overruled their objections, and they excepted.

"Said Cortez stated, on cross-examination, that, during his confinement in jail, his wife had been furnished with \$5 per week for her support; that he did not feel friendly towards Martin, because Martin (he thought) had treated him badly, and had tried to bribe him; that he lived with Martin till about the 1st January, 1855; that Martin never turned him off for drunkenness or misbehaviour; that he told his brother-in-law, Gonzales, of Martin's offer to bribe him, before the fire occurred; that he told others, some of whom he named, immediately after the burning of the 'Constitution.' He denied that he had threatened to have revenge of Martin, or that he had tried to persuade Gonzales to swear that he had heard Martin offer to bribe him to burn the 'Constitution'; and he said that he (witness) had been residing in Mobile six

or seven years. One Rivers was then introduced by the State as a witness, and testified, that he lived near Cortez in May last, and that he saw Estapa, almost every night for about a week, at the house of Cortez, shortly before the latter disappeared, and up to the time he went away.

“J. M. Gonzales was introduced as a witness on the part of the defence, and said, that he was a brother-in-law of Cortez, and had worked with Martin in making cigars; that he and Cortez, on Christmas day, 1854, went down together to the ‘Constitution,’ and asked Martin for several small christmas-gifts for each; that Martin refused to give Cortez anything; that Cortez got angry, and threatened to have revenge, and said that, if he saw Martin hanging by the neck, he would pull him by the feet; that after the fire in the ‘Constitution,’ and after Cortez had been before the grand jury, he came to witness, and told him, that he was his brother-in-law, and that he wanted him (witness) to testify that he had heard Martin offer him (Cortez) \$200 to burn the ‘Constitution,’ which testimony witness refused to give, and told Cortez he had better drop the matter; that Cortez said, he had got in the business, and he intended to go through with it; and that Cortez had never before told him of this alleged attempt of Martin’s to bribe him. He testified, also, that Cortez ought not to be believed on oath. Another witness, one Charles Rawles, proved that he was acquainted with Cortez, and knew his general character for truth; that (this on cross-examination) he had had his attention particularly called to Cortez, by finding out that he and his wife were boarding in the house of his (witness’) slaves; that he had inquired about him, of two or three persons, and had heard several persons speak of him,—had himself known him for two or three years, but had never heard his character for veracity discussed; that he would not, from Cortez’ general character, believe him on oath, and that he had never heard any body speak well of him.

“On the part of Martin it was proved, that he carried on a cigar manufactory at his residence, and sold cigars by the wholesale to dealers in town; that this business had a good deal of his attention, and was entirely separate from that of the ‘Constitution’; that on the day of the fire he had gone to

town, about 9 o'clock in the morning, in his buggy, and returned on foot about 12 o'clock,—his horse having run away on his road home, and broken the buggy; that he remained at home until after dinner, and then went away on foot, and came back before night with the marketings; that he was at home from that time, and during a part of the time a couple of acquaintances casually with him, until he was informed by Capt. Johnson of the fire at the 'Constitution,' at which time he and his wife were just preparing to go to bed, other persons in the house having just retired; and that he thereupon immediately got his horse, and went down into the city on horseback. It was proved, also, by a large number of the most respectable witnesses, that Martin was very industrious, had lived in Mobile for seven or eight years, had been punctual and honest in his dealings, and had the reputation of being a good and honest man; and all these witnesses said, that they had never heard anything bad of him, until this prosecution was begun. There was proof, also, that Flinn had become Martin's clerk after Martin's renewal of the policy of insurance on said 4th January, 1855; and there was no proof that the 'Constitution,' or the house of which it was a part, belonged to Lyman Gibbons, or to any other person, or that it was occupied by any person except Martin and Flinn. One witness testified, that there was a small mattress bed in the 'Constitution,' which might have been Flinn's place of sleeping, but he did not know certainly that he slept there.

"The defendant Flinn asked the court to charge the jury, that before they could convict him on the second count of the indictment, alleging an attempt to charge or injure the insurance company, they must be satisfied from the evidence that he was informed that there was an insurance on the property burned. This charge the court refused, and charged the jury, that they must be satisfied, before Flinn could be convicted, that the property was insured, and that he burned it with the intent to defraud the insurance company; and said Flinn excepted.

"The court then charged the jury, on the request of Martin's counsel made in writing, that if they believed from the evidence that the witness Cortez was unworthy of credit, they ought not to convict upon his evidence alone, without corrob-

orating proof; and Martin, by his counsel, requested the court in writing to charge the jury, further, that such corroborating proof ought to be of a fact tending to show the guilt of one or both of the defendants, and not of a circumstance which, if true, did not show that the defendants, or either of them, was guilty; which charge the court refused to give, and said Martin excepted."

The jury having returned a verdict finding both the defendants "guilty as charged in the second count of the indictment," the defendants moved in arrest of judgment, on account of the insufficiency of that count; but the court overruled the motion, and sentenced them to five years imprisonment in the penitentiary.

The errors now assigned embrace all the rulings of the court above stated.

A. R. MANNING, C. P. ROBINSON, and H. CHAMBERLAIN, for the appellants, made the following points :

1. The court ought to have required the solicitor to elect on which count or counts he would proceed.—2 Select Equity and Law Cases, by Parsons, 381.

2. The court ought to have allowed Cleaveland and Moulton to testify. They were not offered to prove facts, but to testify to a conversation of Martin's, in relation to which he could not have adduced testimony at all unless it was first brought before the jury by the State, and he could not know that it would be brought before them.

3. The court erred in admitting the testimony of Cortez in relation to Martin's alleged request to him, in November, 1854, to burn the coffee-house. This offer was made some six months before the fire took place, was not acted on, and was not connected by any proof with the time of the fire, or with the origin of it. Thoughts and intentions are not abiding, like the laws of nature: no presumption of continuance can be applied to them, after such a lapse of time; else might every unguarded expression, every burst of passion, every thought of evil, given over and repented of, be revived years afterwards to give character and criminality to a mere accident happening to coincide in manner and place with the former intentions. This evidence was plainly inadmissible

against Flinn, and the record nowhere shows that the error in admitting it was cured.—14 Ala. 688; 15 *ib.* 624; 12 *ib.* 824; 13 *ib.* 823; 2 Russell on Crimes, 772.

4. The testimony of Cortez in relation to Estapa's alleged attempts to suppress his evidence, the threats which Estapa said Martin made against him, &c., ought not to have been admitted. This was clearly illegal, unless connected with Martin by other proof; and no such connection was shown. As to Flinn it was certainly erroneous.

5. The refusal of the first charge asked by defendants was erroneous. An intent to charge or injure the insurance company could not exist if Flinn had no knowledge of the insurance.

6. If Cortez was unworthy of credit, the jury ought to have been instructed not to convict upon his evidence, unless it was corroborated by other testimony tending to show guilt. Roscoe's Criminal Evidence, pp. 156-8.

7. The judgment ought to have been arrested, on motion, because the second count, on which alone the defendants were found guilty, did not allege the ownership of the goods burned, or that the brandies were insured.—Martha v. The State, 26 Ala. 72; Reg. v. Parker, 3 Ad. & El. (N. S.) 292; 7 Watts, 181; 2 Select Law and Equity Cases, by Parsons, 484-5; Starr v. The State, 25 Ala. 46; Clarissa v. The State, 11 *ib.* 57.

M. A. BALDWIN, Attorney General, *contra*.

STONE, J.—The second count of the indictment in this case is substantially defective, in not charging the ownership of the property alleged to have been burned.—Martha v. The State, 26 Ala. 72. On that count alone the defendants were found guilty, and the motion in arrest of judgment should have prevailed.—Case of Beckwith, 1 Stew. 318; 1 Arch. Crim. Pleadings, by Waterman, 115; *ib.* p. 178, 31.

In Johnson v. The State, Justice Parsons uses the following language, "Any indications (of guilt) arising from the conduct, demeanor, or expressions of the party, are legal evidence against him. The law can never limit the number or kind of such indications."—17 Ala. p. 624. With the rule thus

expressed, we are entirely satisfied. Under its operation, the court below rightly admitted, as evidence to be weighed by the jury, the testimony of Cortez, that some time before the burning, Martin requested him, the witness, to burn the 'Constitution.' Also, the fact that, when Cortez was leaving Alabama, *after the indictment was found*, Estapa, coming out of Martin's house, Martin being present, had possession of Martin's horse and buggy, and with them carried Martin out of the State. The waiving of Martin's hand to Cortez at that time, the payment of money by Martin to Estapa, if witness saw, and could testify to the facts, were admissible evidence; slight circumstances in themselves, but still admissible.

But the various conversations alleged to have been held between Cortez and Estapa, were wholly inadmissible. True, where a conspiracy between two or more to commit a crime, is established as an independent fact, then the acts, conduct and declarations of each are admissible evidence against all. See Arch. Crim. Pleadings by Waterman, vol. 3, pp. 618-19, and notes. But the acts and declarations of one man, made apart, can never be legal evidence against another of complicity with him, unless other proof than those acts or declarations show the community of purpose.—*Stewart v. The State*, 26 Ala. 44.

Rivers was introduced as a witness to sustain Cortez. The testimony he gave was not of a fact or circumstance tending to show the guilt of either of the defendants; and therefore it was inadmissible as a corroborating circumstance.

To justify the conviction of Flinn under the second count in the indictment, it was incumbent on the prosecution to satisfy the jury that he intended to "charge or injure the insurer." He could not entertain that intention, in the absence of knowledge that the property was insured. It was then necessary that the jury should have been convinced by the proof that he had such knowledge. The charge, as asked, ought to have been given; and the one given in lieu of it, not being equivalent to it, did not cure the error. We do not hold that, to justify conviction, a witness must have sworn to the *direct fact*, that Flinn was *informed of the insurance*. It was necessary, however, that facts or circumstances in evidence should have shown that he had such knowledge.

The first branch of the other charge, which was refused, is free from exception. Corroborating testimony, to avail any thing, must be of a fact tending to show the guilt of one or both of the parties.—Roscoe on Criminal Evidence, 157. But the latter branch of the charge is not correct in law. To hold that the corroborating circumstance is insufficient, unless it *shows* the guilt of the defendant, is not to corroborate the evidence, but to make out the case without it. This charge was properly refused.

The defendants having been found guilty “under the second count in the indictment,” and the jury failing to respond to the other three counts, it follows that the prosecution as to the other three counts is at an end.—Coleman & Owen v. The State, 3 Ala. 14. The second count, we have seen, is insufficient.—Campbell v. The State, 9 Yerg. 333; Morris v. The State, 8 Smedes & Marshall, 762; The State v. Kelly, 2 Tyler, 471; Burns v. The State, 8 Ala. 313.

The judgment of the city court is reversed, and the cause remanded. Let the prisoners remain in custody until discharged by due course of law.

SALOMON *vs.* THE STATE,
AND
BOULLEMET *vs.* THE STATE.

[INDICTMENTS FOR BEING CONCERNED IN SETTING UP OR CARRYING ON A LOTTERY.]

1. *When sale of foreign lottery tickets is within statute.*—A resale of a ticket in a lottery not authorized by the legislative authority of this State, by a third person totally disconnected from the lottery, is not a violation of the statute (Code, § 3254), when his previous purchase extinguished all interest or ownership of every agent, conductor, manager, or proprietor in the ticket; but otherwise it is.
2. *Judicial notice taken of general course of business.*—It is the duty of courts judicially to know the general course of the transactions of human life, and whatever ought to be generally known within the limits of their jurisdiction; *e.g.*, the peculiar nature of lotteries, and the mode in which they are generally carried on.

3. *Evidence tending to prove concernment in carrying on lottery.*—Evidence showing that a bookseller in this State, through a series of months, kept on hand in his store tickets in a lottery not authorized by the legislative authority of this State, and at various times sold them; that he continued to keep such tickets on hand, after having been indicted and convicted for selling them, and instructed his clerk to inform persons applying for such tickets that he could not sell them, and refused as a general thing to sell them, but yet did sell to some persons,—tends to prove that he was concerned in carrying on the lottery.
4. *Burthen of proving his purchase rests on defendant.*—Where evidence is adduced by the State showing that the defendant had sold tickets in a foreign lottery under such circumstances as tend to prove that he was concerned in carrying on the lottery, if the defendant wishes to protect himself on the ground that he had previously purchased such tickets, and that he had no connection with the lottery, the *onus probandi* rests on him; and if he fails to adduce any evidence of that fact, a charge which assumes that there is such evidence, or which refers to such purchase as a material fact in the cause, is abstract, and may properly be refused, although it assert a correct legal proposition.
5. *Certainly necessary in instructions to jury.*—Instructions to the jury should be direct and certain: a charge which is involved and confused may properly be refused.

FROM the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

INDICTMENTS for setting up, or being concerned in setting up, or carrying on a lottery, without the legislative authority of this State; one against A. M. Salomon, found at the May term, 1855, and two against Milton Boullemet, found at the July and November terms, 1855. In each case a bill of exceptions was taken to the rulings of the court, which present the only questions for revision in this court.

In Salomon's case the bill of exceptions is as follows:

"On the trial of this cause, the proof was, that the defendant had sold lottery tickets which purported on their face to be Maryland, Georgia, and Havana lottery tickets; that he bought said lottery tickets at wholesale, and sold them at retail, making about twenty per cent. profit; that the buying and selling of said tickets was in said county, within twelve months; that he kept a store on Royal street, usually called a 'variety and fancy store', and bought and sold said tickets as he bought and sold any other article in his store—to-wit, to make a profit on the same; that he was not the agent, conductor, manager, or proprietor of any of said lotteries,

and had no interest in any of them ; that he sold tickets on his own account, and not for any agent, conductor, manager, or proprietor of any of said lotteries. The court charged the jury, among other things, 'If you believe that the defendant is shown to have been engaged in the business of buying and selling lottery tickets, of a lottery to be drawn and not authorized by the laws of this State, it would amount to being concerned in carrying on such lottery, if done in the county of Mobile within twelve months previous to the finding of the indictment'; to which charge the defendant excepted."

In Boullemet's cases the bills of exceptions are as follows :

No. 2985.—"On the trial of this cause, it having been proved that the defendant, within twelve months before the finding of the indictment, had sold, at his bookstore, in the county and city of Mobile, lottery tickets in a lottery in the State of Georgia, the defendant proved, on his part, that he purchased said tickets from one Samuel Swan of Montgomery, an agent of said Georgia lottery, and resold them at a profit ; that when he purchased them, they became absolutely his ; that he did not, in the sale of them, act as the agent of the proprietors, or persons who set up said lottery, or of any other person, but bought and sold them on his own account, and for his own sole benefit. Upon this evidence, the court charged the jury, that if they believed from the evidence that the defendant had been concerned in setting up, or in carrying on, a lottery in Mobile county, within twelve months before the finding of the indictment in this case, without the legislative authority of this State, they ought to find him guilty. To this charge the defendant excepted ; and then asked the court to charge the jury, that if they believed from the evidence that he did nothing more concerning such lottery, than to buy some of the tickets thereof and afterwards resell them, without having been a proprietor in said lottery, or a setter up of the same, or an agent of any person interested in the same, *than that* he bought and sold tickets in such lottery on his own account, they ought to find him not guilty. The court refused to give this charge, and the defendant excepted to the refusal."

No. 2984.—"On the trial of this cause, the State introduced one William Reynolds as a witness, who testified, that

he was defendant's clerk, and had been acting in that capacity for several months previous to the finding of this indictment; that defendant kept a bookstore in the city of Mobile; that there was a lottery in the State of Georgia, called the 'Fort Gaines Academy lottery'; that he had seen in defendant's possession, within twelve months, Fort Gaines Academy lottery tickets, and had seen defendant, at various times, sell said tickets at his said store; that this was previous to a former indictment, based upon these facts, on which the defendant stood convicted; that defendant had instructed him, since that time, to inform persons applying for tickets that he (defendant) could not sell them; but that defendant still had such lottery tickets in his possession, and had sold them to some individuals, refusing, as a general thing, to sell them. The State next introduced Levi Langdon as a witness, who testified that he was a proprietor of the Mobile Advertiser, and produced several copies of his said journal, of dates within the last twelve months. In said copies of his journal were advertisements of the intended drawings of the Fort Gaines lottery, signed by Samuel Swan, Atlanta, Georgia, and making no reference to the defendant. The witness stated, that he had contracted with said Swan to publish said advertisement, and did not know the defendant in the business; and that defendant had never had anything to do with said advertisement. This was all the evidence. The court charged the jury, that a sale of lottery tickets in an unauthorized lottery constitutes the offence of being concerned in carrying on a lottery, unless it appears from the evidence that said sale was for the purpose merely of getting rid of said tickets, and not for the purpose of distributing them in this State. The defendant asked the court to charge the jury, that a sale of tickets, purchased from a foreign lottery, by a party having no connection whatever therewith, on his own private account, and for his own individual benefit, is not, in any sense, being concerned in carrying on such lottery; which charge the court refused, and the defendant excepted. The defendant further asked the court to charge the jury, that proof which merely shows a sale of tickets in a foreign lottery, and either does not further show that said sale was made on account and for the benefit of said lottery, whether as proprie-

tor, contractor, agent, or otherwise, or on their behalf, or leaves the same subject to a reasonable doubt, is inadequate to maintain the charge contained in the indictment; which charge the court refused, and the defendant excepted."

R. H. SMITH and A. R. MANNING, for the appellants, cited the following cases: *The State v. Scribner*, 2 Gill & J. 246; *Yates & McIntyre v. O'Neale & Smith*, 3 *ib.* 253; *Mount & Wardell v. Waite*, 7 Johns. 440; *Stephenson v. Higgins*, 18 English Law & Equity R. 50; 2 Select Cases by Parsons, 467; Smith's Commentaries, §§ 725, 738, 739, 741, 743, 747.

M. A. BALDWIN, Attorney General, *contra*, cited *Salomon v. The State*, 27 Ala. 29, and authorities there cited on brief for the State.

RICE, C. J.—In *Salomon v. The State*, 27 Ala. Rep. 26, this court decided, that the sale, in this State, of a ticket in any lottery, which had been set up in this State, a sister State, or a foreign State, "without the legislative authority of this State," *for, or on behalf of any agent, conductor, manager, or proprietor* of the lottery, was an indictable offence under section 3254 of the Code. The reason of that decision consists in this: that the person making such sale was, by the very act of making it, carrying on, or concerned in carrying on, the lottery.

Of the correctness of that decision we do not entertain a doubt. But it certainly does not sanction the position, that after such sale has been made to a third person, totally disconnected from the lottery, and after he has become the exclusive owner of the ticket, his subsequent sale of it is an indictable offence. In such a case, the true inquiry is, did any agent, conductor, manager, or proprietor of the lottery have any interest or ownership in the ticket at the time of the subsequent sale, or had all such interest or ownership been extinguished by the previous sale. If the previous sale was, in law and in fact, a sale "out and out" of the ticket, and extinguished all interest or ownership of every agent, conductor, manager or proprietor of the lottery in the ticket, then the subsequent sale would not be an indictable offence; otherwise it would be.

The tickets in a lottery belong to its managers, proprietors, or conductors, until they are sold or given away. The lottery cannot carry on itself, but is necessarily carried on by its proprietors, conductors, or managers, or by agents appointed by them. The sale of tickets is part of the carrying on. "It is the duty of courts judicially to know what is the general course of the transactions of human life," and "whatever ought to be generally known within the limits of their jurisdiction."—1 Greenlf. Ev., § 6; Duncan v. Littell, 2 Bibb's Rep. 424. In view of the peculiar nature of lotteries, and of the mode in which they are generally carried on, we lay down the following propositions: Evidence that a bookseller in this State, through a series of months, kept on hand in his bookstore tickets in a lottery not authorized by the legislature of this State,—that he had at various times sold such tickets in his bookstore; that after he had thus sold some of such tickets he had been indicted and convicted therefor; that *after such conviction* he continued to keep on hand in his store tickets of the same lottery, and instructed his clerk to inform persons applying for such tickets that he (the bookseller) could not sell them, and refused, as *a general thing*, to sell them; but that, notwithstanding all this, he did sell such tickets to some persons,—certainly tends to prove that he was concerned in carrying on the lottery. And where evidence of that description, and having that tendency, has been adduced by the State, on the trial of an indictment for carrying on or being concerned in carrying on a lottery contrary to the provisions of section 3254 of the Code, if the defendant wishes to defend himself, upon the ground that he had purchased the tickets for selling which he is indicted, and that he had no connection with the lottery, the burthen of proving such purchase is on him; and if there is no evidence of such purchase, a charge asked by him, which assumes that there is evidence of such purchase, or which refers directly to such purchase as a matter of some consequence in the case, is abstract, and may for that cause be refused, although the legal proposition asserted in it is correct.—See 1 Greenlf. Ev. (5th edition), §§ 36, 74, 79, 83; and the notes to sections 36 and 79.

Applying the views above expressed to the three cases now under consideration, the result is as follows: The judgment

of the court below in the case of *Salomon v. The State*, is reversed and remanded, for the error in the charge of the court below. The judgment in *Boullemet v. The State*, No. 2985, on the first division, is reversed and remanded, for the refusal of the court below to give the charge asked by the defendant; the judgment in *Boullemet v. The State*, No. 2984 on said division, is affirmed. In the case last mentioned, no exception was taken to the charge given; and the first charge asked by the defendant was abstract, and therefore properly refused. The other charge asked by him is too involved and confused. Charges to the jury should be direct and certain. *Cothran v. Moore*, 1 Ala. Rep. 423. There was no error in refusing either of these charges.

EX PARTE BANKS.

[APPLICATION FOR BAIL AFTER ITS REFUSAL BY CIRCUIT JUDGE.]

1. *Bail in capital cases*.—Under the provisions of the constitution (Art. I, § 17) and laws (Code, §§ 3669-70), a person indicted for murder is entitled to bail, as a matter of right, unless the court to which the application is made is of opinion, on the evidence adduced, that he is guilty of murder in the first degree; and if the application for bail is made to a circuit judge, and is by him refused, the evidence in the case may be set out on exceptions (Code, § 3673), and application made thereon to the supreme court.
2. *Murder in the first degree not here shown*.—Upon the evidence set out in the bill of exceptions (for which in full see statement of the case), the defendant was held entitled to bail as a matter of right, because the court could not, upon that evidence, say that he was guilty of murder in the first degree, as defined by section 3080 of the Code.
3. *Amount of bail*.—That the defendant is a man of fortune is a fact which may well be considered in fixing the amount of his bail.

APPLICATION by Thomas G. Banks, under section 3673 of the Code, for bail. The petition, with the accompanying exhibits, shows that the prisoner was indicted, in the city court of Mobile, at its November term, 1855, for the murder of Wm. H. Trone; that a trial has never been had under said

indictment ; that on the 26th day of February, 1856, he was brought, on *habeas corpus*, before the Hon. C. W. Rapier, the judge of the sixth judicial circuit, by whom his application for bail was heard and denied ; and that the evidence adduced on the hearing was committed to writing, and embodied in a bill of exceptions which is made a part of the present application. The evidence set out in the bill of exceptions, so far as it has any bearing on the points decided by this court, is as follows :

W. W. Hill.—[*Sworn by defendant.*] “ Was present at the death of Trone. Was by the side of Trone and Banks at the time. Walked into the Battle-House bar, and found Banks with his arm around the shoulder of R. G. McMahan. Was in the act of walking up to Banks, and putting my hand on his shoulder, and Mr. Mullen at that moment walked up. McMahan was about to leave the bar-room at the time Mullen came up. Trone walked up at that moment, spoke to Banks, and said, ‘ How d’ye do ? ’ Banks replied in same manner, and Trone asked him how he had been ; he replied, he felt pretty well, though some one had been interfering with him. I spoke to Mr. Mullen after he made that remark ; don’t recollect what I said to him. The next thing I saw was the pistols : Banks had a pistol in each hand, raised up in front of his breast ; and the pistol he had in his right hand fired, and killed Trone. Trone remarked, that he was shot. Banks said, ‘ Have I shot him ? ’ and said, ‘ I would not have done it for my life. ’ They met, apparently as friendly as men could meet. He held the pistols as if he had no idea they would go off. He was telling Trone how he had been imposed on by some one. He appeared to have been recently badly beaten ; his face was much bruised. [*Cross-examined by solicitor.*] I was present, also McMahan, before the killing. Mullen was on my right, Banks on my left, and Trone on the left of Banks. I was looking at Mullen at the time the pistol fired. After Banks said he had been beaten, he drew the pistols. I did not hear Banks ask Trone to take a drink. I am sure the language of Banks was, that he would not have killed Trone for his life. I did not hear him say, he thought he had killed Horace Buckley, or anything of that sort : if he had said so, I would have heard it. I think I made the

same statements before the coroner. I suppose it was about three minutes from the time I spoke to Mullen that the pistol fired. Trone asked Banks how he was; Banks said, he felt pretty well, but that he had been badly beaten; and Trone asked him who had done it. I at that time turned, and spoke to Mullen; and don't know what reply Banks made, and don't know what words passed between them from that time until the pistol fired. Banks had two pistols; the one with which he killed Trone was the largest; it was a percussion pistol. I think the cock was underneath; am not positive about that: did not examine the pistol, and do not know whether it has to be cocked to fire it off. (The pistol was here produced, and identified by the witness.) [*Re-examined by defendant.*] Myself, Mullen, Banks and Trone were all in a group. I just turned myself towards Mullen. The conversation between Banks and Trone was friendly, and, if it had changed to an angry tone, would have arrested my attention. They appeared to be glad to meet each other. Banks held the pistols as if he was showing them, and not in a manner as if he was going to use them. Banks was very drunk."

J. N. Mullen.—[*Sworn by defendant.*] "I was present at the death of Trone. Was on that evening passing through the bar-room of the Battle-House, going into the bath-room, and met Mr. Hill, and spoke to him. About the same time, or very soon after, Banks came up, and spoke to some one,—whom, I did not at that time know. Their greeting appeared to be friendly; and when I heard the voice, I recognized it as that of Trone. I was engaged in conversation with Mr. Hill. Hill spoke to Banks, and held out his left hand to him: I had hold of Hill's right hand. About that time I thought I saw Banks move his arm, and almost instantly heard the report of the pistol. I then turned, and saw Trone, and Banks, with his right hand, extended towards Trone, with a pistol in his hand; and as soon as I could see Trone distinctly, his hand was up to his breast. The first thing I heard said was Trone's exclamation, 'My God, gentlemen, it is too bad that I should be killed so.' During this time, not knowing whether or not there was a quarrel, and seeing Trone's hands to his breast, and thinking he was about to draw a weapon,

I moved down towards the centre of the room, and then saw that he was very bloody. Banks appeared to be very much confused, and, I thought, by this time appeared to be pretty much sobered; and went and laid his pistol down on the box, or something of that kind, and turned and met Trone, and took him by the arm, and went with him out at the door, and asked once or twice where he wanted to go to, and said that he would take him anywhere, or do anything for him. When they came out, I discovered that Trone was sinking, and stepped up to him, and caught him by the right hand and arm, and let him down against the wall and on the pavement. The crowd then began to come up, and I left, and went into Mr. Murray's. Banks had hold of him when he came out at the door; I think he let go of Trone about the time we let him down. I took Banks to be very drunk when I met him in the bar-room. I don't think more than ten minutes elapsed from the time Banks came in until I went away. [*Cross-examined by the solicitor.*] This occurred about 7 o'clock in the evening. I was near the fire-place, on the north side of the bar-room. There were probably ten or fifteen persons, or more, in the room. I did not pay much attention to the persons there. This is a public bar-room, and I presume a good many people go there. My impression is that it was a friendly greeting, as "How are you, old fellow?" or something of that sort; don't recollect distinctly what it was that was said; think Banks spoke to Trone first, but am not certain; don't recollect what Trone said to Banks; did not hear Banks ask Trone to take a drink; think it was not more than two or three minutes, if that much, from the meeting of Banks and Trone until the pistol fired, but cannot say positively, as I was paying no attention at all to what they were saying; don't know what the words were that passed between Trone and Banks between the time of the accosting and the firing of the pistol. Banks was standing, after the pistol fired, with his arm extended towards Trone in a nearly horizontal position, with the muzzle of the pistol rather pointed downwards. I was not looking in the direction of Banks when the pistol fired; and turned around as soon as I could, and saw the pistol in the position above described. My impression was, at the time, that every one in the room ran out when the pistol

fired, except Trone, Banks, and myself. I did not hear Banks say he would not have shot Trone for his life. I did not see any one nearer, or so near, to Banks and Trone after the firing, as myself. There might have been some persons behind the screen. My impression was, at the time, that Hill went out at the north door of the room when the pistol fired. I have known Mr. Banks, by sight, some three years. (The witness was here asked by the solicitor whether he had ever seen Banks, when drunk, commit any acts of violence; to which question the defendant's counsel objected. The witness answered that he had not.)"

A. A. Sassaman.—(*Sworn by defendant.*) "Was not present when Trone was shot; found him in the street. When I came up, Banks had hold of Trone, and was saying, 'Trone, I did not intend to kill you,' or 'did not go to kill you,' or something of that kind—do not now remember the exact words. Banks was easing Trone down. [*Examined by the solicitor.*] Trone was standing on the pavement, in front of the Battle-House, and falling in towards the door-step.

Richard Jackson.—(*Sworn by defendant.*) "Was not present when Trone was shot; got in a few seconds afterwards. Shortly after the pistol fired, I stepped into the bar-room, and saw Banks take Trone by the arm, and said to him, 'It was accidental you know, Trone, we have always been the best of friends.' About that time they stepped out at the door, and Trone attempted to sit down, but, instead of sitting down, he fell. Banks then called for help to get his (Trone's) overcoat off. In a very few minutes a good many were asking who it was that shot; and Banks said, 'I am the man that shot—T. G. Banks is my name.' He was arrested very soon after this, and taken off. I don't recollect what Banks said when he said it was him that shot, but think he said he had almost as soon have shot a brother. I heard him use these words, but don't know whether it was at that moment or not; it was before he was taken away by the arresting officer. [*Cross-examined by the solicitor.*] I have known Banks about three years. Knew Trone; knew him better, if anything, than I did Banks. When I got in, they were not more than half way from the spot where Trone was shot to the door. I remained with Trone until Banks was arrested. I don't

think I saw the pistols at that time. I had seen Banks, I think, about ten minutes before the shooting occurred; he had a couple of pistols at that time. I have not seen Banks since his arrest, until to-day."

Horace Buckley.—[*Sworn by defendant.*] "Was not present when Trone was shot. I crossed the street immediately on hearing the report of the pistol, and met Trone coming out of the house, and assisted in laying him down. About that time Banks came up, and said, 'My God, Horace, I did not intend to do it;' and took hold of Trone, and assisted in laying him down. When some one shoved him back, he then said, 'I did it, but did not intend to do it; myself and Banks have always been friendly.'"

John W. Davis.—[*Sworn by defendant.*] "Was not present when Trone was shot; was standing in the door of the Patterson-House, and, on hearing the report of the pistol, walked across, and got on the pavement just as Trone was coming out of the Battle-House. In the confusion, I did not recognize any one; but about the time they laid Trone down, I recognized Banks stooping over him, and put my hand on him to attract his attention, and asked him who did it. He replied, 'It was me, Thomas G. Banks. I did not go to do it.' I then asked him who it was he had shot; and he said it was Horace Buckley. 'You know,' said he, 'John, I would not have shot him. I had as soon have shot a brother,' or some such remark as that. When they raised Trone up, I saw his face for the first time, and recognized him; and said to Banks that it was Trone he had shot. He replied, that it could not be Mr. Trone,—it must be Horace Buckley; and he frequently remarked to me, and to others then present, that he did not go to do it,—that he would not have done it for the world."

Mr. White.—[*Sworn by defendant.*] "It was in the evening, after sundown, on the day Trone was shot, that Banks got the arms, or pistols. (The pistols were here produced, and proved to be the same that Banks had, with one of which Trone was shot.) They were given to him to defend himself. I saw two men beating him, and ran to his assistance, and found him very badly beaten and bloody. I did not know the men, and Banks did not appear to know them. I gave him these pistols at that time, in consequence of this assault,

to defend himself with. I loaded one of the pistols myself, and do not know whether the other was loaded or not. I had loaded the one on Tuesday evening before Trone was shot, which, I think, was on Thursday evening. The other pistol I had borrowed from a friend. The one I loaded was loaded merely for my own protection, and not with a view to give it to Banks to shoot any body. I don't suppose that Banks knew anything about the charge that was in either of the pistols. The pistol I borrowed had no cap on it at the time I gave it to Banks; I don't know whether it was loaded or not. The other was loaded, and had a cap on it. I have very seldom seen a man so bruised and cut up about the face as Banks was. I had not seen Banks in Mobile until that evening. I heard the men who had beaten Banks make some threats, but don't recollect what the words were; it was only one of them I heard make the threats; I did not know him, and have not seen him since."

Mr. Kounts.—[*Sworn by defendant.*] "One of the pistols was handed to this witness, and he was asked if he recognized it; to which he answered, 'I do; it is mine. I loaned it to Mr. White on the same evening that Trone was killed, a little after dark. I had loaded it a long time before,—don't know when. I happened to be moving that afternoon, and picked it up and put it in my pocket.'"

Patrick Divine.—[*Sworn by defendant.*] "I was at the house where Banks was beaten on the day Trone was shot. I heard the noise, but did not see the fight. He was badly beaten, and cut over the eye."

T. R. Vaughn.—[*Examined by the solicitor.*] "I saw Trone shot. There were about six persons in the room at the time. The first words that passed between Banks and Trone, were, Banks reached out his hand to Trone, to tell him good evening, and Trone shook hands with him. I can't tell whether Banks, at that moment, had his pistols in his hands; he had them just before that. Banks, after shaking hands, asked Trone to go up and take a drink with him; Trone thanked him, and said he could not go. I did not understand anything else that was said between them. They were from five to seven feet from me. I saw Trone and Banks when the pistol was fired. Banks had the pistol in his hand, with his

arm crooked, and the point of the pistol pointing upwards. Trone was nearly in front of him. I did not see the wound that was inflicted until after Trone was dead. I saw the blood running before he died. Some time after the firing of the pistol, I heard Banks say something. I think Banks went out of the room when the pistol fired; he disappeared from my sight. I stepped up to see if it was McMahan that was shot, and saw Trone with his hands up to his breast, and heard him say, 'Gentlemen, is not this too bad.' I was not acquainted with either Banks or Trone. I turned to take hold of Trone, and some one then came up and took hold of him, and I left the room. I did not hear Banks speak to Trone, in the house, after the shooting. I do not think he could have spoken to Banks (?) in the house, after the shooting, without my hearing it. He did not speak to him, in the house, after the shooting; if he spoke to him, it was at the door. Trone was about six feet in height. [*Cross-examined by defendant.*] There was considerable confusion and excitement after the firing. Immediately after the firing I stepped up to see if it was not McMahan who was shot. He had his arm around Banks' neck. I don't pretend to say that what other witnesses say they heard was not said, but that I did not hear it; my attention was not directed to what might be said. I don't know whether Banks had a pistol in his left hand when he fired or not; he had one in his right hand; he had two before the firing, one in each hand."

Dr. A. F. Follin.—[*Sworn by the solicitor.*] Wm. H. Trone was killed by a ball from a pistol, or gun. The ball entered about the collar-bone, in a parallel direction, and, coming in contact with the collar-bone, passed on, in an oblique direction, downwards. There were two balls. They did not penetrate, in a horizontal direction, more than the sixteenth of an inch. From the appearance of the wound, the pistol must have been in an elevated position, and been fired as it had a downward tendency, but discharged as it got upon a level descending. [*Cross-examined by the defendant.*] I only intend to state that the point of the pistol being elevated, and discharged while it was descending, was one of the ways it could have entered in the way it did. Any person who saw how it was done would be worth more than any speculation

by one who did not see it. [*Re-examined by the solicitor.*] If the point of the pistol was in an elevated position when the ball was discharged, it would have ranged upwards; but in this case the tendency of the balls was downward. The form of the collar-bone is rather flat. [*Re-examined by defendant.*] If the point of the pistol had been raised and was falling, or was depressed and being raised, the same result might have followed; or it might have occurred in twenty different ways."

R. H. SMITH, with whom was W. BOYLES, for the prisoner:

In this State, all offences are bailable, except murder in the first degree (Constitution, art. I, § 17; Code, §§ 3669-70); and the rule of law is, that where there is doubt the prisoner must be bailed.—1 Bacon's Abr., 581; 1 Wheeler's Criminal Cases, 445-8; 3 East, 155; 5 Cowen, 50-60. To constitute murder in the first degree, under our statutes (Code, § 3080), the killing must have been willful, deliberate, malicious, and premeditated; or must have been done by an act greatly dangerous to the lives of others, and evincing a depraved mind regardless of human life. The facts of this case, as disclosed by the evidence, show an accidental killing. There is nothing on which to predicate malice: on the contrary, the friendship of the parties, the character of the conversation when the act occurred, and the conduct of the accused, repel the idea of intention to kill. The fact of drunkenness tends to repel premeditation; and the inference of premeditation, which might otherwise be drawn from the use of a deadly weapon, is repelled by the proof as to when, how, and for what purpose the pistols were obtained.—Wharton's Criminal Law, 251, 253; 1 Stra. 481; Commonwealth v. Jones, 1 Leigh, 611; 9 Humph. 670; 4 Yerger, 141; 10 Humph. 105-11; The State v. Bullock, 13 Ala. 413.

E. S. DARGAN, with whom was M. A. BALDWIN, Attorney General, *contra*:

The sheriff's return to the *habeas corpus* shows that the prisoner was confined in jail under an indictment for murder. If no other evidence had been adduced by the prisoner, there can be no doubt that bail would be refused; otherwise, all prisoners indicted for murder are *prima facie* entitled to bail,

and the *onus* is on the State to repel such presumption. The legitimate consequence is, that the prisoner, after indictment for murder, is not entitled to bail, if the evidence leaves it doubtful whether or not he is guilty of murder in the first degree; and hence, to entitle himself to bail, he must by evidence remove that doubt. This, in effect, is the ruling in McCrary's case, 22 Ala. 72. Does the evidence, then, adduced in this case, remove all doubt on this question? It seems that no one saw the shooting; but when the witnesses, the instant the report of the pistol was heard, cast their eyes on the prisoner, his arm was extended on a level with his shoulder, with the pistol slightly inclined downwards, and Trone was shot. How could the arm be raised and extended, the cock of the pistol drawn back, and the trigger pulled, without design, or by mere accident? A man is presumed to have intended the natural consequences of his acts; and the character of the instrument used has an important bearing on the question of intent. The prisoner's subsequent conduct and declarations, not being brought out against him by the State, are not admissible evidence in his favor.—Campbell's case, 23 Ala. 79. If there was intent, the act was willful; and, in the absence of all provocation, however slight, an intentional killing must be malicious. The additional words, "deliberate" and "premeditated," as used in the statute, are almost (if not entirely) synonymous; and if design and intention existed, and directed the act, it must have been premeditated.—Wharton's American Law of Homicide, pp. 372-4.

RICE, C. J.—By the Code, murder is divided into two degrees. Murder in the first degree may be punished with death, but murder in the second degree can be punished only by confinement in the penitentiary.

Section 3080 of the Code defines murder in the first degree as follows: "Every homicide perpetrated by poison, lying in wait, or by any other kind of willful, deliberate, malicious, and premeditated killing, or which is committed in the perpetration of, or the attempt to perpetrate, any arson, rape, robbery, or burglary, is murder in the first degree; so, also, every homicide perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other

than him who is killed, or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, although without any preconceived purpose to deprive of life any particular individual."

By the provisions of our constitution and Code, the defendant is "entitled to bail as a matter of right," at our hands, unless we are of opinion, on the evidence, that he is guilty of murder in the degree which may be punished capitally—that is, in the first degree.—Const. of Ala. art. I, § 17; *Ex parte McCrary*, 22 Ala. Rep. 65; *Ex parte Croom & May*, 19 Ala. Rep. 561; Code, §§ 3669, 3670.

We cannot, upon the evidence before us, say that he is guilty of murder in the first degree. And upon that ground, we are unanimous in the opinion, that he is entitled to bail as a matter of right, independent of the other grounds relied on by the counsel for the defendant.

As the case will hereafter be tried by a jury, we will not incur the hazard of doing injury either to the State or the defendant, by commenting upon the evidence, when our duty does not require us to make any further disclosure of our opinion than we have above made.

On the part of the defendant it is admitted that he is a man of fortune. This is a fact which may well be considered in fixing the amount of bail.

In consideration of the premises, it is ordered, that the defendant, be admitted to bail; that the amount thereof be twenty thousand dollars; and that, upon his giving a written undertaking, signed by himself and at least two sufficient sureties, agreeing to pay to the State of Alabama twenty thousand dollars, unless he, the said Thomas G. Banks, appear at the next term of the city court of Mobile, and from term to term thereafter until discharged by law, to answer the offence of murder, to be approved by the sheriff of Mobile county, who is hereby directed to take bail under this order, that the sheriff may discharge the said Banks out of his custody.

DUNLAP ET AL. vs. ROBINSON.

[TRIAL OF ISSUE CONTESTING THE VALIDITY OF A WILL.]

1. *Error without injury.*—In contesting the validity of a will, the sustaining of a demurrer to one of the contestant's pleas, when he had the full benefit of the same facts under the issues presented by his other pleas, is not an available error.
2. *Admissibility of evidence in rebuttal of facts tending to show adulterous intercourse.*—The contestants, for the purpose of showing an adulterous intercourse between the testator and the mother of the children who were his legatees, having adduced evidence of his intimacy with her and her family, his visits to her house during her husband's absence, his familiarity with the children, his presents to them, &c.; *held*, that the proponent might rebut this proof by evidence showing that their intercourse was characterized by a religious sentiment, such as the fact that they frequently attended class-meetings together at church.
3. *Provision by will for illegitimate children not void.*—There is no rule of law, and no reason founded either in morals or in public policy, which prohibits an unmarried man from making provision by will for his illegitimate children.
4. *Burthen of proof.*—On the trial of an issue to test the validity of a will, the *onus* is on the proponent to show the testator's capacity and the due execution of the will; and when these facts are established, it then devolves on the contestants to show fraud or undue influence.
5. *What is undue influence.*—Undue influence, such as will vitiate a will, must in some degree destroy the testator's free agency, and constrain him to do that which is against his will, but which he is unable to refuse, or to weak to resist; it is not enough that the testator's own misconduct may have brought about a condition of things, which, operating as a moral inducement on his mind, may cause him to make a disposition of his property which, under other circumstances, he might not have made.
6. *Charge held erroneous as tending to mislead the jury.*—A charge which assumes that an immaterial question of fact is an issue to be tried and determined by the jury, is well calculated to mislead them by withdrawing their minds from the true issues in the cause, and may for that reason be refused.
7. *Charge held erroneous, and therefore properly refused.*—A charge, as asked, held to have been properly refused, because, if the fact assumed in it was true, the charge was abstract, and, if untrue, it did not conform to the evidence.

APPEAL from the Circuit Court of Macon.

Tried before the Hon. ROBERT DOUGHERTY.

IN THE MATTER of the last will and testament of David Dunlap, deceased, which was propounded for probate, on the

18th September, 1852, by James J. Robinson, who was the father of the beneficiaries provided for in it, and was contested by the appellants, who were the brothers and heirs-at-law of the testator. The venue was changed, on the application of the contestants, from Chambers to Macon county, where a trial was had at the October term, 1854, of the circuit court. The paper propounded for probate was dated July 25, 1852, and was attested by three witnesses. By its terms the testator gave all his property, both real and personal, amounting in value to about \$20,000, to the four children of said James J. Robinson and Mary his wife; reserving to their mother a life estate in two of the slaves, and appointing their father his sole executor.

The contestants filed nine specifications, or pleas, against the probate of the will, which were, in substance, 1st, "that said paper is not the last will and testament of said David Dunlap, and ought not to be admitted to probate as such"; 2d, that said paper is not the last will and testament of said David Dunlap, "but is the offspring and result of fraud practiced upon him"; 3d, "that said paper is not the last will and testament of said deceased, but is the direct offspring and result of insane delusion, existing in his mind at the time he signed, delivered, and published the same as his last will and testament"; 4th, "that said paper is not the last will and testament of said deceased, but is the direct offspring and result of undue influence, exerted and exercised over his mind and will"; 5th, "that said David Dunlap, at the time he subscribed said instrument, was not of sound and disposing mind and memory, but was of unsound mind"; 6th, "that said instrument contains a disposition of his property materially different from the disposition which said deceased would have made, if, at the time he signed and published the same, he had been free from importunity, undue influence, and fraud, and that he was not at that time free from importunity, undue influence, and fraud"; 7th, "that said instrument was never executed, nor attested, as the last will and testament of said deceased, and is not his last will and testament, and ought not to be admitted to probate as his last will and testament"; 8th, "that said instrument, and its signing by said deceased, were procured by undue influence exerted over him, and that

without such undue influence he never would have signed it"; and, 9th, "that said instrument is not the last will and testament of said deceased,—that his signature thereto was procured by illegal means, and contrary to law, and by undue influence, and that the apparent sanction given to said instrument by said deceased was procured by an illegal and immoral consideration, and by undue influence, and contrary to public policy." The court sustained a demurrer to the third plea, and issue was joined on the others.

All the evidence adduced on the trial is set out in the bill of exceptions, but it is unnecessary to state it in detail. The proponent proved the due execution of the will, and the testator's mental capacity at the time of its execution, by the three subscribing witnesses. Evidence was introduced by the contestants to prove that an adulterous intercourse had subsisted for many years between the testator, who was an unmarried man, and Mrs. Robinson, the mother of the legatees. It was proved that the deceased and said James J. Robinson had lived near each other, from the year 1835, before the birth of the oldest child, up to the death of the former; that their houses were only a few hundred yards apart; that Robinson was a volunteer in the Creek war in 1836, and was absent from home during the months of June, July, and August; that he came home for a few days, during those months, about once in three weeks; that his wife went over to Dunlap's house, and remained there during her husband's absence; that her husband found her there on his return, and did not seem to be displeased at it; that the eldest child was born in April, 1837; that when Robinson was absent from home at night, Dunlap went over and slept at his house; that he was very intimate with the children,—allowed them to sleep with him, made them frequent presents, sometimes paid their tuition bills, &c., &c. One of the witnesses for the contestants testified to acts of familiarity between Dunlap and Mrs. Robinson; and another, that he had heard Dunlap admit that the children were his.

"The proponent offered to prove that, between 1840 and 1852, Dunlap frequently went to the class-meetings of the Methodist church in his neighborhood with Mrs. Robinson. The contestants objected to this proof, as illegal and irrele-

vant ; but the court admitted it, and they excepted. The proponent offered to prove the character of Mrs. Robinson in the neighborhood in which she lived, and that it was good ; but the court, on the motion of the contestants, excluded this evidence." One of the subscribing witnesses to the will testified, " that, soon after the deceased signed the will, witness desired to know what were his hopes as to the future, and asked him as to such hopes ; and that the deceased answered, that all was right,—that he felt clear and joyful."

The court gave the following charges, at the request of the proponent's counsel, to each of which the contestants excepted—viz :

" 1. That although the jury may believe that the persons provided for in the will are the illegitimate children of the testator, and the offspring of adulterous intercourse between him and Mrs. Robinson, and that the object of the testator in making his will was to provide for his said illegitimate children, then the will is not void on account of such adulterous intercourse.

" 2. That if they believe that the testator was of sound mind and memory, and made the will of his own free will, and not in consideration of future cohabitation with Mrs. Robinson, they must find in favor of the will, although they should believe that the children provided for in the will are the offspring of adulterous intercourse between the testator and Mrs. Robinson previous to the making of said will.

" 3. That the burthen of proof is on the contestants, to show that the will was procured by undue influence, or by fraud, or by any agreement.

" 4. That adulterous intercourse itself is not that which the law calls undue influence, which will invalidate a will."

The contestants requested the following charges :

" 1. That if the will now propounded for probate is the direct offspring and result of long-continued sexual intercourse between the testator and Mrs. Robinson, and of an influence acquired by her over said testator by such sexual intercourse, *and influence said testator never would have made any such disposition of his property as is made by the provisions of said will*,—then, upon this state of facts, the jury must find for the contestants. The court refused this charge, and the contestants excepted.

2. That, in determining whether the testator in his lifetime had sexual intercourse with Mrs. Robinson, the jury cannot consider what he said as to his hopes for the future at the time he signed the will, as testified to by one of the subscribing witnesses to the will. The court refused to give this charge, and the contestants excepted.

"3. That there is no proof before the jury as to the character of Mrs. Robinson, and they cannot consider of her character in determining whether she did not have sexual intercourse with the testator. The court refused this charge, and instructed the jury, that they might infer what the character of Mrs. Robinson was from the evidence in the cause; and the contestants excepted, both to the charge given, and to the refusal to give the charge asked."

The sustaining of the demurrer to the contestants' third plea, the admission of the evidence to which they objected, the charges given, and the refusals to charge as asked, are now assigned for error.

JAS. E. BELSER and GEO. W. GUNN, for the appellants.

CLOPTON & LIGON, *contra*. (No briefs on file.)

CHILTON, C. J.—1. The first assignment of error, namely, that the court should have overruled the demurrer to the contestants' third plea or specification, cannot be sustained; first, because the issue is to be "made up under the direction of the court", (Code, § 1634); and, secondly, because, if the insane delusion went to the whole will, the contestants have had all the advantage of it under the 5th specification; but if only to a portion of the will, it is too indefinite, and therefore bad. It is clear, however, that any valid objection to the will, by reason of want of sanity of mind on the part of the testator, could have been urged under the issues which were before the jury; so that the contestants, having had the full benefit of all their proof, which could have availed under the third plea or specification, have not been injured, and cannot complain.—*Shehan v. Hampton*, 8 Ala. Rep. 942; *McKenzie v. Jackson*, 4 *ib.* 230; *Rakes v. Pope*, 7 *ib.* 162; *Reav. Digest*, p. 319, § 71, and cases there cited.

2. The contestants took a very wide range in their efforts to impeach this will. One attempt was to show that propo-
nent's wife had procured him to make it, in consideration of
her admitting him to have adulterous connection with her.
To establish this fact, many questions are propounded to wit-
nesses by the contestants—his intimacy with the family ; his
staying all night at Robinson's house when he was absent ;
his intimacy with the children of the family ; whether they
did not sleep with him ; whether he did not make presents to
them and to their mother, &c., &c. Now, to rebut any pre-
sumption, attempted to be raised by such circumstances, of
an adulterous intercourse between the supposed testator and
Mrs. Robinson, it seems to us entirely proper for the other
side to be allowed to prove circumstances *tending* to show
that their intimacy was characterized by religious sentiment,
if it was not the result of a common religious sympathy. The
fact that they frequently went together to the class-meetings
of the Methodist church, during the time of their alleged
illicit intercourse and intimacy, tends to show that such inti-
macy was prompted by a sentiment of a virtuous, religious
character, and was not meretricious. True, the spirit of evil
may invade the most sacred precincts, and men may be hypo-
crites,—may put on the garb of religion as a cloak for the
vilest enormities ; yet these are exceptions. Whatever may
be said by the unjustly censorious, experience demonstrates
that such meetings are usually frequented by the good and
the virtuous, as a means of spiritual improvement, and are
anything but agreeable resorts for the wicked and abandoned.
Under the view we have taken of this evidence, as merely
rebutting the presumption of improper conduct as arising out
of the intimacy between the parties, we think it was properly
received.

3. Every person of sound mind, and who labors under no
legal disability, has the right to dispose of his property by
will as he pleases ; and whether his will be prompted by par-
tiality, pride, or caprice, is immaterial, if the will is not ob-
tained by fraud or undue influence.—Coleman v. Robinson's
Exrs., 17 Ala. Rep. 88. There is certainly no reason,
founded either in morals or public policy, why a man who
was never married, but who had children, the offspring of an

adulterous sexual intercourse, should not provide for them. Our law compels the putative father to provide for his bastard children ; and the policy which lies at the basis of such legislation would no less sustain a voluntary provision made by one who had violated the marriage bed in their procreation. The books furnish many cases of provision by will for illegitimate offspring ; and if this was the testator's object in the will before us, we know of no case which holds the will void for that reason.—See Jarman on Wills, vol. 2, pp. 93 to 112. The first charge given was, therefore, free from objection. The same reasoning equally applies to the second charge, and shows that it is free from error.

4. The third charge asserts, that the burthen of proof is on the contestants to show that the will was procured by undue influence, or fraud, or agreement. The *onus probandi* is on the party propounding the will, as to his testator's capacity to make a will, and its due execution by him. When this proof is made, the *onus* is generally discharged, (*Cranmer v. Crumbaugh*, 3 Maryland Rep. 491); and if the contestants say there was fraud or undue influence, the *onus* is upon them to show these, as asserted in this charge.—Jarman on Wills, vol. 1, pp. 72, 73, note 5, 2d Amer. ed.

5. If we rightly comprehend the first charge prayed for by the contestants, it was property refused by the court, for reasons similar to those before stated. It assumes that, "if the will is the direct offspring and result of long-continued sexual intercourse between the testator and the mother of the legatees, Mrs. Robinson, and of an influence acquired by her over him by such intercourse, and but for such influence he would not have made such disposition of his property as is made by this will, then they must find for the contestants." It will be observed that the charge does not proceed upon the idea that Mrs. Robinson actively interfered in procuring the will to be made, using an influence which deprived the testator of the freedom of disposing as he pleased of his estate ; but that if the testator chose, or was disposed to give the property as by this will it is appropriated, in consequence of his long-continued sexual intercourse with Mrs. Robinson and the influence which she acquired over him by reason of such intercourse, then the will is void. In other words, to

give a simpler illustration of the idea, if a man, who is unmarried and living the life of a bachelor, prostitutes a woman, violates the marriage bed, and, after many years of continuous illicit cohabitation, is influenced by the silent operation of these circumstances to make provision by his will for her children, who may be the issue of such illicit intercourse, the will is void. Such is not the law. The case of *Farr v. Thompson*, Cheves' Rep. 37, is a much stronger case than the one presented by the charge, and yet a provision for the prostitute was held valid. Undue influence, as that term is understood in this connection, must be such as, in some measure, destroys the free agency of the testator, and prevents the exercise of that discretion which the law requires a party should possess as essential to a valid testamentary disposition of his property. It is not enough that by the testator's own improper conduct he has brought about a condition of things, over which, at the time of making his will, he had no control to change or remedy, but which, as a moral inducement, operated upon his mind, influencing him to make a disposition of his property which, under other circumstances, he might not have made. If the testator was guilty of the enormity attributed to him in the charge, of continuous shameful intimacy with a married woman for many years, it would certainly not tend to mitigate his offence, should he have a spurious offspring dependent on her or her husband for support, to cast them pennyless upon the world. He may well be influenced, under such circumstances, by a desire to repair the injury he has done, so far as he can do so, by providing for their education and support. If, however, the will was made in consideration of promises of future illicit cohabitation, it would be clearly void. This, however, is not the point of the charge.—See, as to the question of undue influence, *Gilbert v. Gilbert*, 22 Ala. Rep. 529; 1 Rich. Rep. 80; 1 Speers, 93. To vitiate a will, it must be such as, in some degree, to destroy the free agency of the testator, and constrain him to do what is against his will, but what he is unable to refuse or too weak to resist.—1 Jarman, (2d Amer. ed.) p. 36.

6. The second charge prayed for by the contestants was properly refused by the court. It was well calculated to

mislead the jury, withdrawing their minds from the true issues in the cause, and making the validity of the will depend, by implication, upon an immaterial issue,—namely, whether the testator had illicit intercourse in his lifetime with Mrs. Robinson. It assumes that that is an issue to be determined,—a fact to be found, one way or the other, by them. Indeed, it is properly a part of the preceding charge, on which it is predicated, which sought to obtain a judicial announcement to the jury of the effect of such cohabitation upon the will, and to obtain for it an effect which we have seen it could not properly exert. Having, by the first charge, settled upon the legal effect, the second is proposed as limiting the means for its ascertainment; that is, in determining whether the parties had sexual intercourse, the jury must not regard what the testator said at the time he made his will as to his spiritual condition,—“his hopes for the future.” Now we have shown that such intercourse, though it gave rise to the will as furnishing a motive to provide for offspring, or to repair a wrong, does not invalidate the will. Indeed it tends to strengthen it, since otherwise the testator might be left without a rational motive for selecting strangers instead of his relatives as the objects of his bounty. But, be this as it may, it is certain no injury resulted to the contestants from the refusal of the court to give the charge, since, let the fact of adultery be found one way or the other, it can make no difference as to the result of this cause, the record showing no effort on the part of Mrs. Robinson to procure the making of the will, or the exertion of any influence which she may have possessed over him in consequence of such alleged intimacy or otherwise, to induce him to exclude his kindred, and to make the provisions which are made in the will before us.

7. The contestants, in like manner, have not been injured by the refusal of the third charge prayed for by them, further restricting the jury in their inquiry as to the alleged adulterous connection. But its refusal is not erroneous for other reasons. If there was any proof of Mrs. Robinson's character, the charge asserting that there was none should have been denied, for want of conformity to the true state of the evidence. If, however, it was true that there was no proof, then the charge is purely abstract, and rightly refused for

that reason. But, if it was intended to affirm that the law raised no presumption that the lady was virtuous and not guilty of adultery, requiring the opposite party, if they alleged adultery, to overcome that presumption by proof, it was incorrect as a proposition of law. In either aspect, it was properly refused. If the character of Mrs. Robinson was the legitimate subject of inquiry for the jury, they were very properly told to ascertain it from the evidence in the cause. If it was foreign from the issue, the charge was abstract, and did no injury to the contestants; and consequently it should not be the ground of reversal.

We have considered all the grounds assigned for error; and are of opinion, that in none of them did the circuit court mistake the law to the prejudice of contestants.

We would take occasion, in conclusion, to say, lest we should be misunderstood with reference to the facts of this case, that our remarks respecting the illicit intercourse of the testator and Mrs. Robinson, and the illegitimacy of the four children who are the beneficiaries in this will, are predicated upon the state of facts assumed by the charges, and not upon our view of the evidence as contained in the record. The counsel have a right to ask for instructions from the court as applicable to any state of the case which the proof *tends* to establish; and in this aspect alone have we considered them. We should be sorry to be understood as affirming that the record exhibits any want of fidelity on the part of Mrs. Robinson towards her husband, or that the children provided for in this will are not legitimate. True, there are circumstances of familiarity and intimacy shown by one or two witnesses, which, unexplained, might furnish strong ground for suspicion, but which, when we consider the long and peculiar friendship existing between the parties, and that this bachelor was treated as a member of Mr. Robinson's family for many years, accustomed to the familiarities, and interchanging the kindly offices which obtain among near relatives, lose much, if not all of their force, and may consist with the most upright deportment.

Let the judgment be affirmed.

RICE, J., having been of counsel, did not sit in this case.

PEARSALL vs. McCARTNEY.

[PETITION BY BANKRUPT FOR SUPERSEDEAS OF EXECUTION—DISCHARGE CONTESTED
ON ACCOUNT OF FRAUD.]

1. *Bankrupt act, second section, construed.*—Under the second section of the bankrupt law, (U. S. Statutes at large, vol. 5, p. 440,) approved August 19th, 1841, the execution by a voluntary bankrupt, after the 1st January, 1841, of a deed of trust giving a preference to some of his creditors, does not invalidate his discharge in bankruptcy, unless the act was "done in contemplation of the passage of a bankrupt law."
2. *Amendment of petition for supersedeas allowable.*—A petition for *supersedeas*, which, under our practice, stands in lieu of a declaration, may be amended, by leave of the court, after demurrer sustained to the original, provided the amendment does not make an entirely different case as to the execution sought to be superseded.
3. *Right to open and conclude argument.*—The defendant in the judgment, who applies for the *supersedeas*, is the plaintiff in the proceedings subsequently had on his petition, and is therefore entitled to open and conclude the argument.
4. *Evidence of bankrupt's general good character inadmissible.*—When a bankrupt's certificate of discharge is impeached for fraud, evidence of his general good character is not admissible for him.
5. *When objection may be raised to irrelevant evidence.*—Irrelevant evidence may be excluded from the jury, on motion, at any time before they retire; the right to move its exclusion is not waived by failing to raise the objection when it is offered.
6. *Using bill in chancery as evidence in another cause.*—When a bill in chancery is offered in evidence, in another suit, as an admission of the complainant, it is governed by the same rules that apply to all other admissions; and consequently he cannot use his amended bill as rebutting evidence against the original.

APPEAL from the Circuit Court of Morgan.

Tried before the Hon. JOHN E. MOORE.

EDWARD PEARSALL, the appellant, obtained a judgment against Alexander A. McCartney, at the September term, 1841, of the circuit court of Morgan, for \$580 92 debt, and \$85 80 damages, besides costs, on which he caused an execution to be issued on the 14th June, 1850, and levied on certain lands, slaves, and other property belonging to said

McCartney. The execution was duly returned by the sheriff, with his levy thereon endorsed; and a writ of *venditioni exponas* was thereupon issued. McCartney then filed his petition for a *supersedeas* of the execution, on the ground of his discharge in bankruptcy under the act of congress approved August 19, 1841. His petition alleged, in addition to the facts above stated, that he presented his petition for the benefit of the bankrupt law, on the 3d September, 1842, to the district court of the United States at Huntsville, and was declared a bankrupt, by the decree of said court, at its May term, 1843; that this decree discharged him from all liability on account of said judgment, and on account of the debt on which it was founded; and that the land, slaves, and other property on which the execution was levied, were acquired by him subsequently to his said discharge in bankruptcy, and are not therefore subject to said execution.

The plaintiff in the execution gave notice that he would contest and impeach the validity of the defendant's certificate of discharge in bankruptcy, on the ground of fraud "in failing to render in his petition and schedule a full and complete inventory of his property, rights of property, and rights of credits, as required by said bankrupt act, and in withholding the same for the purpose of defrauding his creditors"; and filed the following specifications of fraud:

"1. Plaintiff charges that, at the date of defendant's said petition for the benefit of said bankrupt law, there was due and owing to the said defendant, by one Rebecca Adams, the sum of \$550, for board, washing, lodging, fuel, lights, and clothing, which were furnished and supplied to her by said defendant, from the 1st of January, 1839, to the date of his said petition for the benefit of said act of congress; that said defendant, by a special contract between him and said Rebecca Adams, was to receive from her the sum of \$150 *per annum* from said 1st day of January, 1839, for her said board, washing, &c.; that said Rebecca was always able to pay said debt; that, at the time defendant filed his said petition in bankruptcy, said Rebecca had made no payment to him on account of said board, &c.; and that the whole sum which had accrued from said 1st day of January, 1839, to the date of said petition in bankruptcy, was due and unpaid, a valid

and subsisting debt. And plaintiff charges that said McCartney did not surrender said debt owing to him by said Rebecca Adams, or any portion thereof, to the assignee in bankruptcy, or embrace or mention it in the schedule or inventory of his property, rights of property, and rights of credit, but fraudulently and willfully concealed and withheld the said debt, in violation of said act of congress."

"2. Plaintiff charges that, in addition to the articles of property which were allowed by the assignee in bankruptcy, in accordance with the provisions of said act of congress, for the private use of said defendant, said McCartney fraudulently and willfully withheld the sum of \$1,000 in cash, which he did not surrender to said assignee in bankruptcy, nor render in his said schedule, as by law he was required, but fraudulently and willfully withheld the same, in violation of the provisions of said act of congress."

"3. Plaintiff charges that said defendant fraudulently and willfully withheld the sum of \$1,000 in bank-notes, which he did not surrender to said assignee in bankruptcy, nor render in his said schedule of property, rights of property, rights and credits, as by law he was required, but fraudulently and willfully withheld the same, in violation of said act of congress."

"4. Plaintiff charges that said McCartney, on the 6th day of March, 1841; in contemplation of bankruptcy, made and executed a certain deed of trust to James H. Blair as trustee, for the benefit of David M. Hunter, Alexander Ross, and James A. Patterson, to secure certain debts therein mentioned due to the Branch Bank of the State of Alabama at Decatur, and a certain debt to Jesse H. Davis therein named due and owing by said McCartney, on which said beneficiaries and one William Devan were also bound, as is therein shown. And plaintiff charges that said McCartney, in said deed of trust, conveyed all the property which he owned, except a very insignificant fraction thereof; among other things, his tavern house and lots, known as the 'Decatur Inn', and all their appurtenances, two negro slaves, Frank and Lucy, as well as twenty-five beds, bedsteads and clothing, horses, barouche, clock, chairs, sofas, dressing-tables, &c.; that said property was conveyed for the benefit of special and preferred

creditors, to the unjust exclusion of a large number of other creditors not provided for therein; and that said deed was made in contemplation of bankruptcy, and in violation of said act of congress."

"5. Plaintiff charges that said deed of trust was executed on said 6th day of March, 1841, and was made in contemplation of the passage of a bankrupt law; that said McCartney was a voluntary bankrupt; that in said deed of trust a preference was given and secured to said Hunter, Ross and Patterson, over plaintiff and other creditors of said McCartney; and that said deed was otherwise fraudulent."

"6. Plaintiff charges that, under said deed of trust, McCartney enjoyed and realized a usufruct profit, which was worth the sum of \$500, and which he fraudulently withheld from the assignee in bankruptcy, in violation of said act of congress."

"7. Plaintiff charges that said deed of trust was made in contemplation of bankruptcy, and in contemplation of the passage of a bankrupt law, and with the view and intent (said McCartney being a voluntary bankrupt) that certain preferred creditors therein provided for should be secured by the sale of said property, and with the fraudulent and unlawful intent that his property, rights of property, &c., should not pass into the hands of his assignee in bankruptcy, and be fully, justly, and equally divided *pro rata* among all his creditors, according to the provisions of said act of congress; which said fraudulent intent, plaintiff charges, was effected by the sale of said property under said deed of trust."

"8. Plaintiff charges that said deed of trust, made by said McCartney, was executed within six months *after* (?) the passage of said bankrupt law by the congress of the United States; that said McCartney was a voluntary bankrupt; that said McCartney, in said deed of trust, made and secured to certain creditors therein mentioned a preference and priority over plaintiff and other *bona fide* creditors; that a majority in interest of said McCartney's creditors did not assent to his obtaining his certificate of discharge in bankruptcy; and that said deed was made in contemplation of the passage of a bankrupt law, in violation of said act of congress, and with the intent to give a fraudulent preference to the beneficiaries in said deed."

Issue was taken on the first, second, and third specifications, and a demurrer interposed to the others. The plaintiff in execution joined in the demurrer, and insisted that it should be visited on the petition for *supersedeas*. The court held the petition demurrable, but gave leave to amend; and the petition was thereupon amended by inserting the additional allegations, "that said judgment was founded on petitioner's promissory note, bearing date the 8th day of January, 1839, and that said debt was not created in consequence of any defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity." The specifications were then, by leave of the court, amended as follows :

"4. Plaintiff charges that said McCartney, on the 6th day of March, 1841, did make and execute a certain deed of trust, in fraud of said bankrupt law, to James H. Blair as trustee, for the benefit of David M. Hunter, Alexander Ross, and James A. Patterson, to secure certain debts for which they were sureties, and also to secure the payment of a certain debt to Jesse H. Davis therein named, conveying therein his tavern house and lot, slaves Frank and Lucy, &c., &c., and all his property except an inconsiderable part thereof; that said deed of trust was made and executed for the benefit of the aforesaid preferred creditors, to the exclusion of the plaintiff in this suit, of — Gillespie, and of other creditors of said McCartney, who were not provided for in said deed; that said McCartney is a voluntary bankrupt; and that a majority in interest of his creditors who were not preferred did not assent to his discharge as a bankrupt."

"5. Plaintiff charges that a deed of trust was made by said McCartney, dated March 6, 1841, wherein he secured David M. Hunter, Alexander Ross, and James A. Patterson, to the exclusion of plaintiff and other creditors of said McCartney, and was made in contemplation of the passage of the bankrupt law; that said deed conveyed his tavern house and lot, slaves Frank and Lucy, &c.; that said McCartney was a voluntary bankrupt; and that his discharge as a bankrupt was not assented to by a majority in interest of those of his creditors who were not preferred in said deed of trust."

"6. That said McCartney made said deed of trust on the 6th day of March, 1841, preferring and securing therein D. M. Hunter, Alex. Ross, and James A. Patterson, by transferring his tavern house and lot, slaves Frank and Lucy, &c., and in contemplation of the passage of a bankrupt law, and excluding plaintiff and other creditors from the benefit of said deed; that said McCartney was a voluntary bankrupt; that said deed was made with the fraudulent view and intent that said Hunter, Ross and Patterson should be secured by the sale of said property; and that a majority in interest of said McCartney's creditors, not so preferred, did not assent to his discharge as a bankrupt."

A demurrer was interposed to each of the amended specifications, and sustained as to the fourth, but overruled as to the fifth and sixth; upon which issue was then joined.

On the trial, as appears from the bill of exceptions, McCartney read, in support of his motion to quash the execution, his certificate of discharge in bankruptcy, the promissory note on which Pearsall's judgment was rendered, and the date of said judgment; all which were read in evidence to the jury without objection, and corresponded with the recitals in the petition for *supersedeas*; and then rested his case. "Pearsall then introduced to the jury, as evidence under his first specification, the record of a bill in chancery filed by said McCartney, about the 25th August, 1849, against W. J. Delony, who had intermarried with said Rebecca Adams, for the recovery of the debt mentioned in said specification, and attaching certain property for the payment of said debt; also, the record of McCartney's answer to a cross bill filed by said Delony in the same suit, which answer was filed on the 24th December, 1849. Thereupon McCartney offered to read to the jury, as rebutting evidence, the record of his amended bill in the same cause, filed October 7, 1850. It was further in proof, that the execution here sought to be quashed, was issued on the 14th June, 1850, and levied the 2d September, 1850; and that sundry other executions were levied at the same time. Pearsall objected to the reading of said amended bill as rebutting evidence for McCartney; which objection was overruled by the court, and the same was read; and Pearsall excepted."

“Pearsall also introduced as evidence, in support of his first specification, as a circumstance to show that the omission of the said account against Miss Adams could not have been from mere forgetfulness or oversight, the schedule of said McCartney, rendered in upon his petition to be declared a bankrupt, to show that many small accounts and debts due to him were therein included which were worthless. He proved, also, as a circumstance to support the second and third specifications, that said McCartney, at the sale of his effects by the assignee in bankruptcy, purchased certain articles of property; also, various other circumstances, for the purpose of showing that McCartney had made a dishonest and false surrender or schedule of his effects. McCartney then offered evidence to show that eighteen months, or more, had expired between his surrender in bankruptcy and his said purchase; that his purchases at said assignee's sale were worth and cost about \$400; that at his surrender he was in possession of a profitable tavern in Decatur, which he was permitted to retain from the date of his surrender in bankruptcy until said sale,—some eighteen months or more; that the debt on Miss Adams was a worthless account; that she was a poor orphan girl, in delicate health, between twelve and fourteen years old, at the time he filed his said petition in bankruptcy, entirely penniless and dependent, and furnished by him with her clothing, and with medical attendance in her frequent sickness; that the claim against her, at the time of his surrender in bankruptcy, and for many years afterwards, was entirely worthless; that she became possessed of property, by accident, many years after the filing of his petition in bankruptcy, and that, until then, said claim against her was not of any value. McCartney then introduced witnesses to prove that his general character for truth and honesty, both before and after his surrender and petition in bankruptcy, and up to the present time, was wholly unimpeached. To all this evidence Pearsall made no objection, and suffered the same to go before the jury. Plaintiff and defendant then announced to the court that they were through with their testimony, and the court adjourned for dinner. When court was called after dinner, McCartney's attorney was proceeding to put the case to the jury; but before he had entered upon his argument,

Pearsall, by his attorney, moved the court to reject from the consideration of the jury all the testimony in regard to character; which the court refused to do, and Pearsall excepted."

"The court permitted McCartney, by his attorney, to open and close the argument to the jury; to which Pearsall objected, and, his objection having been overruled, excepted."

The errors now assigned are, the sustaining of the demurrer to the fourth amended specification, the allowance of the amendment to the petition for *supersedeas*, and the several rulings of the court shown in the bill of exceptions.

DAVID P. LEWIS and JAS. E. BELSER, for the appellant :

1. The demurrer to the fourth specification ought not to have been sustained. That specification asserts a correct legal proposition, and rests on two propositions: 1st, it states a cause, which, if urged against the bankrupt pending the proceedings on his petition, would have defeated his discharge; and, 2d, that that cause will now avoid his discharge, when proved to be true, under the fourth section of the bankrupt act. The bankrupt act is to be construed, not liberally in favor of the bankrupt, but strictly as against common right; because the rules for the construction of statutes require, that a statute which is intended to deprive creditors of all remedies for honest debts should be construed strictly, and that a statute shall be so construed that, if possible, no clause, sentence, or word in it shall be superfluous, void, or insignificant.—*Salters v. Tobias*, 3 Paige's Ch. R. 346; *Dwarris on Statutes*, 21, 79; 12 Modern R. 513; 9 Bacon's Abr., 250, 256; *Reynolds v. Baldwin*, 1 La. Ann. R. 162.

The application of these rules to the bankrupt act will show that the second clause of the second section embraces two classes of persons who are excluded from the benefit of the act; while the construction which would make it embrace only one class, lessens the number of persons who are still bound to pay their debts, and gives no significance whatever to the words "subsequent to the first day of January last, or at any other time." It is reasonable that congress should have excluded persons who made preferences among their creditors after the 1st January, 1841, from the benefits of the act; and it is not unreasonable that the time

specified, the 1st January, 1841, should be taken as conclusive that the preference was made "in contemplation of the passage of a bankrupt law." It was then notorious that such an act would become a law; and this provision was evidently intended to guard the cardinal policy of the law,—a *pro rata* distribution of assets among creditors.

The awkward punctuation of the section, on which an argument for the appellee's construction is predicated, will not be allowed to change the obvious meaning of the statute. *Campbell v. Harding*, 2 R. & M. 390. To make the words, "subsequent to the 1st January last," mean the 1st January, 1842, would nullify the words "in contemplation of the passage of a bankrupt law"; for an act could not be done "in contemplation of the passage" of an act already passed.

There are, then, four classes of persons embraced in the second section of the act, as not entitled to discharges; and the discharges in all the four classes stand upon the same basis, and may be avoided for the same reasons.—1 *Cushing*, 569-72; 9 *Metcalf*, 434; 4 *Denio*, 75; 7 *Watts & Serg.* 312; 2 *Story*, 358-60; 13 *U. S. Digest*, p. 79, §§ 1 to 5; *United States v. Jones*, 3 *Wash. C. C. R.* 209.

2. The original petition for the *supersedeas* brought the case before the court; and the court erred in allowing it to be amended.—*Branch Bank at Mobile v. Coleman*, 20 *Ala.* 145.

3. That McCartney's amended bill in chancery was improperly received as evidence in his favor, see *Lee v. Hamilton*, 3 *Ala.* 583.

4. The court erred in permitting McCartney to introduce evidence of his general good character, to rebut the presumption of fraud arising out of the circumstances of the case. *Ward & Thompson v. Herndon*, 5 *Porter*, 386, which overrules the case cited in the text of *Greenleaf*; *Gough v. St. John*, 16 *Wend.* 653; *Humphrey v. Humphrey*, 7 *Conn.* 118; *Givens v. Bradley*, 3 *Bibb*, 195; *Potter v. Webb*, 6 *Greenlf.* 18; *Dorsey v. Whipps*, 8 *Gill*, 457.

5. The opening and conclusion of the argument should have been allowed to Pearsall's counsel. Pearsall was the plaintiff in the execution, and retained his character of plaintiff throughout the proceedings. He occupied the same posi-

tion as if he had sued upon his judgment, and had replied fraud to a plea setting up the discharge in bankruptcy. The *supersedeas* merely arrested the execution until court, and then became *functus officio*. Could McCartney have dismissed the proceedings?—Grady's Adm'r v. Hammond, 21 Ala. 428; Worsham v. Goar, 4 Porter, 441; Dunlap v. Clements, 18 Ala. 783; Edwards v. Lewis, 16 *ib.* 815; Shearer v. Boyd, 10 *ib.* 281.

R. W. WALKER, *contra*:

I. As to the demurrer to the fourth specification:

1. The matter of this specification, if well pleaded, will not avail to impeach a discharge in bankruptcy. There is a clear distinction between acts which are a fraud on the bankrupt act and acts which are in themselves fraudulent. Thus, the giving of preferences is an unlawful act, and would prevent the grant of a discharge; but giving a preference is not such an act of fraud as will impeach a discharge when obtained.—North Am. Ins. Co. v. Graham, 5 Sandf. 197, cited in U. S. D. 1853, p. 80, § 33; Mabry v. Herndon, 8 Ala. 848, (856, 858); Fox v. Paine, 10 Ala. 523, (525-6); Weiner Farnum, 2 Barr, 146, (151); Humphreys v. Swett, 31 Maine, 192; Sinclair v. Smith, 1 Brev. 402.

By the 4th section it is provided, that if any bankrupt shall be guilty of either of certain specified acts, "he shall not be entitled to any such discharge." It is also provided, that the discharge, when granted, shall be conclusive, *unless impeached for fraud or willful concealment*. The distinction is broadly drawn between acts which will avail in *denial* of the discharge in the bankrupt court, and acts which furnish grounds for its impeachment after it is obtained. This is obvious from the language of the 4th section, and is confirmed by the 2d section. Again, there is a marked distinction made between the conveyances specified in the first clause of the 2d section and those specified in the last. While the first are pronounced "*utterly void and a fraud on this act*," the only consequence of the last is, that if the execution of them be made "to appear in the course of the proceedings in bankruptcy, the petitioner *shall not receive his discharge*."

All of the cases relied on by the appellant are cases in

which the ground for impeaching the discharge was the making of some one of the conveyances specified in the *first* clause of the 2d section, and which are denounced by the act itself "as utterly void and a fraud on this act." Such conveyances have some element of *moral fraud*, and there is no great hardship even in *avoiding* a discharge because of them.

2. The demurrer was properly sustained, because it does not allege that the deed was made "in contemplation of the passage of a bankrupt law." The averment that it was made "in fraud of the bankrupt law" is the statement of a legal conclusion.—*Rugely v. Robinson*, 19 Ala. 404; *Chadwick v. Starrett*, 27 Maine, 138; *Mabry v. Herndon*, 8 Ala. 858, (863); *Stewart & Fontaine v. Hargrove*, 23 Ala. 430, (436). The words, "in contemplation of the passage of a bankrupt law", refer to all the conveyances specified in that sentence. A conveyance executed "subsequent to the 1st day of January last", but *not* "in contemplation of the passage of a bankrupt law", is not within the provision of that section.—7 *Watts & Sergt.* 305, (313.)

The punctuation of this clause confirms this view. To hold that the bare execution of a deed of trust, or *giving* a preference in *any other way* after 1st January, 1841, and not in contemplation of the passage of a bankrupt law, but in perfect good faith, was not only good reason for *refusing* the discharge, but is conclusive in *impeachment* of it, would work incalculable injury, and lead to most disastrous results. Not one in ten of the bankrupt certificates obtained in this State would be good, under this construction of the act. The universal understanding of the bar and people of this State has been otherwise; and this court will pause before it will change a construction so long acquiesced in, and to disturb which would open the floodgates of litigation and bring ruin on individuals and families.

3. But the words "subsequent to 1st January last," in the 2d section, refer to 1st *January*, 1842, not 1841. The act (by the 17th section) took effect 1st February, 1842, and every section of it speaks from that date.—*Weiner v. Farnum*, 2 Barr, 144 (151); *Chadwick v. Leavitt*, 5 Law Rep. 424; In the matter of *Eli Horton*, 5 Law Rep. 462.

4. But, even if the demurrer was improperly overruled, this

court will not reverse, because the defendant had the full benefit of the matter pleaded in the 4th specification, under the 5th and 6th. The test is, were the facts alleged in the 4th, *admissible* under the 5th and 6th specifications.—19 Ala. 66; 15 *ib.* 276; 4 *ib.* 230; 7 *ib.* 162; 24 *ib.* 521.

II. The grant of leave to McCartney to amend his petition was not objected to below. No exception being taken to it, it cannot be assigned for error.—Gordon v. McLeod, 20 Ala. 242; Saltmarsh v. Bower, 22 Ala. 224. Besides, the petition is considered as the declaration of the plaintiff, and the specifications as the pleas of defendant; and they are both within the statute of jeofails.—Edwards v. Lewis, 16 Ala. 817; 10 *ib.* 279; 23 *ib.* 429 (437.)

III. As to evidence of character: The objection to the discharge, on the ground that the bankrupt did not make a full disclosure, *involves a charge of fraud and perjury*, and ought to be substantiated by direct testimony, or by unequivocal circumstantial evidence of it.—*In re* Pearce, 21 Vermt. 611; Sanders v. Smallwood, 8 Iredell, 125. That proof of general character was admissible under the charges made and evidence introduced, see 1 Greenl. Ev., § 54, note 1, (5th edition); Fowler v. Ætna Ins. Co., 6 Cowen, 675; Townsend v. Graves, 3 Paige, 455; Ruan v. Perry, 3 Caines, 120; Ward & Thompson v. Herndon, 5 Porter, 382-6; Felix v. State, 18 Ala. 720 (725.)

The defendant, by permitting the evidence to go to the jury, under the circumstances detailed in the bill of exceptions, waived the objection. He will not be allowed thus to speculate and experiment on the evidence.—Allen v. Smith, 22 Ala. 422 (423); Phillips v. Lane, 4 Howd. (Miss.) 122 (127); Nichols v. Hayes, 13 Conn. 156; 22 Ala. 271.

IV. As to admission of McCartney's amended bill: The amended bill is but a continuation of the original bill, the two forming a *unit*. The defendant, having introduced a part of this "one record", made the whole evidence.—1 Daniell's Ch. Prac. 455, and notes; Hard v. Everett, 1 Paige, 424; Crocker v. Clements, 23 Ala. 296; Buller's N. P. 57; 1 Starkie's Ev. 291; 1 Phill. Ev. 341.

V. As to right to open and conclude: The petitioner was the plaintiff, and the contestant the defendant. *Superse-*

deas is a suit, and governed by all the rules applicable to ordinary suits. The *plaintiff* is always entitled to open and close. *The trial was on McCartney's motion to quash.*—Edwards v. Lewis, 16 Ala. 815; Shearer v. Boyd, 10 *ib.* 279; Moore & Cocke v. Bell, 13 *ib.* 469 (473); Grady's Adm'r v. Hammond, 21 *ib.* 427-8; Bruce v. Barnes, 20 *ib.* 219.

GOLDTHWAITE, C. J.—We will first consider the action of the court below in sustaining the demurrer to the fourth specification, which alleges that McCartney, on the 6th of March, 1841, executed a deed of trust in fraud of the bankrupt law, for the benefit of certain creditors, conveying to them for their benefit his tavern house and lot, certain slaves, and all his property except an inconsiderable part thereof.

It is to be observed, that the single matter of fraud alleged in this plea is the act of the bankrupt in giving by deed, executed on the 6th March, 1841, a preference to certain of his creditors. The allegation, therefore, that the deed was executed in fraud of the bankrupt law, is merely a conclusion of the pleader, and is entitled to no weight, unless the execution of such a deed is, of itself, a sufficient ground to invalidate the proceedings, or to impeach the discharge.

The bankrupt law was passed in August, 1841. The second section provides, "that all future payments, securities, conveyances, or transfers of property, or agreements, made or given by any bankrupt, in contemplation of bankruptcy, and for the purpose of giving any creditor, endorser, security, or other person any preference or priority over the general creditors of such bankrupt; and all other payments, securities, conveyances, or transfers of property, made or given by such bankrupt in contemplation of bankruptcy, to any person or persons whatsoever, not being a *bona fide* creditor, or purchaser for a valuable consideration without notice, shall be deemed utterly void and a fraud upon this act; and the assignee under the bankruptcy shall be entitled to claim, sue for, recover, and receive the same as part of the assets of the bankruptcy; and the person making such unlawful preferences and payments shall receive no discharge under the provisions of this act. *Provided*, that all dealings and transactions

by and with any bankrupt, *bona fide* made and entered into more than two months before the petition filed against him or by him, shall not be invalidated or affected by this act; *Provided*, that the other party to such dealings or transactions had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act. And in case it shall be made to appear to the court, in the course of the proceedings in bankruptcy, that the bankrupt, his application being voluntary, has, *subsequent to the first day of January* last, or at any other time, in contemplation of the passage of a bankrupt law, by assignment or otherwise, given or secured any preference to one creditor over another, he shall not receive a discharge, unless the same be assented to by a majority in interest of those of his creditors who have not been so preferred."

The question is, whether giving a preference to a creditor since the first day of January, 1841, although such act is not done in contemplation of the passage of a bankrupt law, is prohibited by this section. The language used in the first part is without the slightest ambiguity. It covers only such preferences as may be given by the bankrupt, after the passage of the law, *in contemplation of bankruptcy*. Now it would be very strange if the law-makers should visit an act done before the law with a penalty, and allow the same act to pass free if done after the passage of the law; and this must be the effect, if the construction insisted upon by the appellants be correct. If a bankrupt gives a preference before the passage of the law, it prevents his discharge; if after, he can obtain it. We are to distinguish in favor of the preference given after the act, and denounce the preference which the bankrupt gives before its passage.

Such results appear to our minds so unreasonable and contradictory that we could only be forced to adopt a construction which would produce them by the clearest and most unequivocal language. We fully concede that, in the interpretation of statutes, courts should, if possible, give effect to every word and sentence; although it is frequently very necessary, in the application of this rule, not to lose sight of others equally as important in enabling courts to arrive at the true intent of the statute. The main argument to sup-

port the construction contended for by the appellants, is, that in giving any other we should nullify the words, "subsequent to the first day of January last." But we see no real difficulty on this point. We regard the words referred to as used simply to designate a certain period of time included between the first of January, 1841, and the passage of the act; and the words "or at any other time," immediately following, can only be referred to a period antecedent to the first of January. The act to which the statute points, when done within either of these periods of time, is thus connected with the succeeding words, and is prohibited only when done in contemplation of the passage of a bankrupt law. The whole sentence, we agree, is awkwardly expressed; but the construction we have given it violates no rule, and harmonizes instead of conflicting with the other parts of the act.

As to the amendment of the petition, we are satisfied that it was within the power of the court. Under our practice, the petition for the *supersedeas* stands in the place of the declaration (Edwards v. Lewis, 16 Ala. 315); and we can see no good reason why it may not be amended, provided that, in so doing, an entirely new case is not made, as to the execution which is described in the petition. If the amendment changed the execution, we incline to the opinion, that a new order and *supersedeas* would be necessary, if the object was to continue the *supersedeas*. But this is not the case here, as the amendment merely states the ground on which the rights of the petitioner depends, with more fullness and particularity; and in this aspect we can see no possible objection to it, the more especially as none was made to it by the opposite party, who answered it by his specifications.

Upon the question of practice, as to which party has the right to open and conclude, the construction given by this court, since a very early day, to the 19th rule of practice (Clay's Digest, 610), is that in every case the plaintiff has this right. Worsham v. Goar, 4 Port. 441; Grady v. Hammond, 21 Ala. 428. We have frequently held, also, that, with us, the *supersedeas* was a substitute for the old writ of *audita querela*.—Edwards v. Lewis, *supra*; Bruce v. Barnes, 20 Ala. 219. In that writ, the defendant in the judgment was the actor, or plaintiff, and complained of the other party, (F. H. N. B. 234.)

who demurred, or pleaded.—Tidd's Practice, 672, 717, 718. So, in the petition for, and the writ of *supersedeas*, the defendant in the execution is the actor; the petition, or statement of facts, which in law entitles him to the relief he seeks, stands in the place of the declaration; and the plaintiff in the judgment either demurs or pleads to it. It is in the nature of a new suit.—Shearer v. Boyd, 10 Ala. 179; Edwards v. Lewis, *supra*; Bruce v. Barnes, *supra*. It was upon the same principles that we held, in Grady v. Hammond, *supra*, in an issue between a plaintiff in attachment and the transferee of the debt attached, that the former was entitled to the opening and conclusion; for the reason that, in that proceeding, he was the actor, and consequently the plaintiff. Upon all the analogies, we must hold that McCartney, in these proceedings, occupied the position of plaintiff, and therefore had the right to open and conclude.

As to the question of allowing the general good character to be given in evidence, in civil causes, the rule is, that in slander, criminal conversation, and breach of marriage contract, as the character of the party may legitimately enter into the question of damages, in such cases, it may be given in evidence (2 Stark. Ev.); but although the issue in civil cases may directly involve the commission of a fraud, the English rule, as well as the current of American cases, is, that the party against whom the fraud is charged is not warranted in repelling it by evidence of his character.—Att'y Gen. v. Bowman, 2 B. & P. 532, n. a.; Gough v. St. John, 16 Wend. 646; Swetz v. Plunket, 1 Strob. 372; Potter v. Webb, 6 Greenl. 14; Cow. & Hill's Notes to Ph. Ev., 456, and cases there cited. Our own court, in Ward v. Herndon, 5 Port. 382, held in conformity with the views we have expressed; and we consider that decision a correct exposition of the law.

It is urged, however, that as the appellant made no objection when the evidence was offered, but permitted it to go before the jury, and did not ask to exclude it until after the evidence on both sides was closed; his motion was, under these circumstances, properly overruled.

There may be cases, where the party waives his right to object, by failing to do so in time; as where secondary evidence is offered, in which case, if this objection be not made

in season, the other party may not have the power to obviate it.—*Russell v. The Union Insurance Co.*, 1 Wash. C. C. R. 409; *Concord v. McIntyre*, 6 N. H. 527. But this is on the ground that the objection, if made in time, might have been removed, and goes rather to the mode and manner of proof than to the evidence itself. But the principle has no application to evidence which is in its nature irrelevant; and as to evidence of this character, the party who is in fault, by introducing it, cannot complain of its rejection at any stage of the trial. It is true that, in *Townsend v. Jeffries*, 24 Ala. 329, we held that the failure to object to a written interrogatory, asking a witness where he saw a trespass committed, and to describe it, operated as a waiver to the reply, if responsive. There, however, the fact to which the question pointed, if established, was relevant to the case; while here the fact is altogether irrelevant, and we think, where such is the case, the objection may be properly taken at any time before the jury retire.—*Creed v. White*, 11 Humph. 549.

In relation to the admission of the amended bill, which the court allowed the appellee to introduce as rebutting evidence, after the original bill had been offered by the other party, we have only to observe that, where a bill in equity is used as evidence in another suit, as an admission of the complainant, it is governed precisely by the same rules which apply to other admissions (*Roberts v. Tennell*, 3 Mon. 249); and no rule is better settled than that admissions, made at one time, cannot be qualified or controlled by counter declarations made at another.—*Lee v. Hamilton*, 3 Ala. 529. It may be that an amended bill must be taken as part of the original bill, in the suit in which it is filed, and could there be used as evidence to rebut or explain admissions made in the original bill; for the reason, that the opposing party in the case has the advantage of his answer also as evidence. But in a different suit, where the parties are not the same, the rule would not apply.

For the errors we have noticed, let the judgment be reversed, and the cause remanded.

RICE, J., having been of counsel, did not sit in this case.

HATTON vs. LANDMAN ET AL.

[BILL IN EQUITY TO ESTABLISH BY PAROL RESULTING TRUST IN LANDS.]

1. *Resulting trust founded on presumed intention, and not raised between parent and child.*—The resulting trust which, in equity, arises in favor of the person who advances the purchase money of land, is founded upon presumptive intention, and is designed to carry that intention into effect. It will not be created in opposition to the declarations of the person who advances the money, nor in opposition to the obvious purpose and design of the transaction. The mere fact that the purchase money was advanced by a parent, while the conveyance was taken in the name of a child who is not shown to be provided for, is not sufficient to raise the presumption of such a trust.
2. *Evidence in this case held insufficient.*—Bill filed by two sisters, against widow and devisee of deceased brother, to establish resulting trust in lands purchased by decedent in his own name, but paid for with money advanced by his mother. The complainants were all of lawful age when the purchase was made; the bill was not filed until after the expiration of more than sixteen years from the purchase, more than nine years after the death of the old lady, and more than three years after the death of the son; and the only excuse alleged for the delay was disproved. The complainants' evidence consisted principally of the old lady's declarations, made in her son's presence, that her money had paid for the land; the son's admissions of that fact; and his promise to his mother that he would "do what was right between his sisters, after she was gone, in relation to the land." The other evidence in the cause showed that the son lived with his mother, and managed her business, for six or seven years before the purchase was made, and from that time until her death; that his services to her, for which he was not shown to have received any compensation, were worth more than the price of the land; that he was an economical and industrious man; and that his mother knew, several years before her death, that he claimed the land as his own. The court refused to establish the trust; holding that the declarations of the parties were reconcilable with the non-existence of the trust, or with its waiver and discharge before the old lady's death, and that the evidence, under all the circumstances of the case, was not sufficient.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. E. D. TOWNES.

THIS bill was filed by James Landman and Julia, his wife, and John M. Lynch and Nancy, his wife, against Mary A. W. Hatton, the widow and devisee of James Hatton, deceased, and Edmund Toney; and its object was to establish

and enforce, for complainants' benefit, a resulting trust in certain lands, alleged to have been purchased by said James Hatton, and to have been paid for with money advanced by his mother. The substantial allegations of the bill are as follows :

That, for several years prior to 1834, James Hatton was the agent of his mother, Frances Hatton, in the management of her business, and as such agent sold her crops, received the proceeds, and paid it out for her; that in 1834, Samuel Hatton, another son of said Frances, agreed to sell to his mother a certain quarter-section of land, (the S. E. quarter of section four, township five, range two west,) for \$1,000, "but, finding his wife unwilling to join in a conveyance of it to his mother, agreed with said James, that he would make the deed of conveyance to him, for the use and benefit of his mother; that accordingly said Samuel and wife did make their deed, dated February 11, 1834, whereby they conveyed said quarter-section of land to said James, for which said James paid him \$1,000"; that the consideration is expressed in said deed to have been \$2,000, because said Samuel's wife was unwilling to sell said land for a less sum. "Complainants have been informed, believe it to be true, and so charge, that the \$1,000, so by said James to said Samuel paid for said land, was in fact the money of said Frances, and that said land was so purchased by him for her." The bill also alleges, that said James, about the ———, purchased from one John Hatton another tract of land, containing eighty acres, but how much he paid for it complainants do not know; "and complainants have been further informed, believe it to be true, and so charge, that said James bought this land, and paid for it, with the money of said Frances, and for her use and benefit, but took the evidence of title in his own name."

It is further alleged, that said Frances died in September, 1841, after having in July, 1838, made and published her last will and testament, by which she disposed of most her property in specific legacies to complainants, Julia and Nancy and said James, who were her children, but neither of said tracts of land was included in either of said legacies; that said Julia, Nancy and James were also appointed residuary

legatees; that said James afterwards died, in March, 1847, having made and published his last will and testament, by which he gave all his property to his said wife Mary. It is further alleged that said James, immediately after the death of his mother, took possession of both of said tracts of land, and claimed them as his own; that upon his death, his widow also took possession of them, and has since sold them to said Edmund Toney, who is also made a defendant to the bill. It is also alleged, that Nancy was married to John M. Lynch after the death of said Frances Hatton.

The answer of Toney sets up his purchase, *bona fide* and for valuable consideration, without notice of complainant's alleged claim, and denies, on information and belief, the trust charged in the bill. Mrs. Hatton, also, in her answer, denies all the allegations of the bill, on information and belief, in relation to the trust. The statute of non-claim, and other matters which it is unnecessary to notice, are pleaded in bar of the relief sought.

On the part of the complainants, the following witnesses were examined: R. A. Jamar, Wm. Acklen, Robertson Brewer, and Nancy T. Graham. Their evidence, in substance, is as follows:

Jamar testifies, that he was Samuel Hatton's overseer in 1835, and during that time he was present at a conversation which took place between said Samuel and his wife, in reference to a certain tract of land (the Bumpass tract, he thinks); that Mrs. Hatton remarked, that she would not convey her right to the land until they sent home a negro named Emma, who was then in the possession of said Samuel's mother. "He has no distinct recollection of whom the title was to be made; but believes it was to be made to said Samuel's mother, from the fact that said negro Emma was in her possession." In answer to one of the cross-interrogatories, he says, "It was the understanding in the Hatton family, that said Bumpass tract was intended for James Hatton; heard his mother, who was a sister of said James, say so."

Wm. Acklen testifies, that he had a conversation with James Hatton, some time in the year 1835, a short time before the date of his mother's will, relative to a tract or tracts of land lying in Madison county, in which conversation said

James stated, "that the legal title to said lands was in him, but that it was purchased with his mother's money; and assigned as a reason for that, that the wife of Samuel Hatton, from whom the conveyance was made, would not consent to unite in a conveyance with her husband to his mother, on account of some family ill-feeling, but was willing to convey to James Hatton, and did so." What particular portion of land it was witness cannot now remember; but his impression is, that it was all the land said James had at that time purchased from Samuel Hatton. Witness wrote the old lady's will, in July or August, 1835, and had been spoken to on the subject three or four times by Samuel Hatton and James Landman; and in this way he received the information above stated. When witness had prepared the old lady's will, according to instructions received from James Hatton and James Landman, he took it out to Landman's house in the country, where he found the old lady and James Hatton; read it over to her, in the presence (as he thinks) of James Hatton and James Landman. "The subject of the land was then mentioned, as it had been left out of the will, and it was then agreed by her, James Hatton and James Landman, that it might stand in that way, as James Hatton would do what was right between his sisters, Nancy Hatton and Mrs. Landman, after she was gone, in relation to the land."

Robertson Brewer testifies, that he witnessed the execution of the deed from Samuel Hatton and wife to James Hatton; that the real consideration, though in the deed stated at \$2,000, was \$1,000, and that the other sum was stated because Samuel's wife was unwilling to sell the land for less; "that said James said, that he was purchasing the land for himself, and intended to keep it; that he did not say whose money he used in paying for said land." Further, that James Hatton lived with his mother in 1834, and for several years previous, and continued to live with her until her death; that his employment was overseeing or superintending her business, and witness does not know of any other means said James had of making money; that there was much property on the plantation on which they lived, which was always called the old lady's. On cross-examination, this witness also testifies, that James Hatton lived with the old lady, his mother, from the

time he first knew them (1829 or 1830) until her death; and managed her business during all that time; that he was very industrious and economical, and his expenses were not more than \$150 per annum; that his services on the plantation were worth about \$200 per annum; that his boy, who was worked on the plantation, was an average hand, worth about \$65 per annum. He also testifies to the execution of another deed in his presence on the same day the deed from Samuel to James was executed, by which Samuel and his wife conveyed another quarter-section of land to the old lady; and he says that Samuel's wife made no objection to joining in the conveyance; that he does not know of James Hatton buying any other property for himself.

Mrs. Graham testifies, that the land was first purchased by Samuel for his mother, and with her money, as witness understood from them; never heard James speak of the purchase, nor heard him say that his mother furnished the money; afterwards heard him say that he could not get the deed made to his mother, from the fact that Samuel's wife would not relinquish her dower, in consequence of which, he gave Samuel his note for \$1,000, and Samuel gave him his for the same amount, and the deed was made from Sam to James. Witness was at Mrs. Hatton's when James came home with the deed, and then heard him say that the above was true, and that he had to give a false note before he could get Sam's wife to relinquish her dower. The old lady was very deaf; and when James came home, his sisters asked him what he had done; and he thereupon stated what is above repeated. The sisters told the old lady, and James then told her, "not to fret, it should all be done right"; James told his mother, that he would make the title to her; and the old lady said, she knew James would do what was right. Her (witness') understanding was, that there was no real consideration from James to Samuel, but that the lands were passed to blind Samuel's wife, so as to effect a relinquishment of dower.

On cross-examination, she testifies, that James and his two sisters (Julia and Nancy) lived with their mother from 1827-8 to 1836, when she left the neighborhood; that James was industrious and economical, and had a negro boy (Joe)

who worked with his mother's hands; that Julia and Nancy were grown—over full age; “before the making of the deed, heard some of the family (can't say which) say that the land should not remain as it was, in the hands of Samuel, but that James should have it for his services, at their mother's death; and afterwards heard them say he should not have it—that he had used the money produced by the sale of the crops, and had not accounted for it, and Nancy said that James was as big a rascal as Samuel; heard Julia repeatedly say, that she would rather give up the land than have such a fuss about it.” She states, also, that on a certain specified occasion, she had said that it never was her understanding that James had been requested or authorized by his mother to purchase said land for her, and that she had never understood, either from said James or his mother, that he had purchased said land for any one; and she now repeats, that what she then said is true; that James owned the negro boy Joe, and got him from his father; that James managed his mother's business from 1827 or 1828, and was a money-making man.

The defendant's testimony was as follows:

Sally Bransford.—Heard James and Nancy, after the old lady's death, say that the lower plantation belonged to James, and the mountain land to Julia and Nancy. Heard James Hatton and James Landman say that the old lady always told James to pay himself for his services.

Richard Jamar.—Married one of James Hatton's sisters. After the old lady's death, sold his wife's interest in the quarter-section of land conveyed by Sam Hatton to his mother for life, and at her death to her children, to James Hatton.

Jacob Bransford, (husband of Sally Bransford.)—James Landman, in 1851, had a conversation with witness, relative to taking his wife's deposition, in which he said, “that he would give (or would not begrudge) \$50, if she would tell all she knew about the Bumpass land”; but witness did not understand it as an offer to bribe them, nor does he think that it was so intended.

M. A. Lewis.—Was one of the subscribing witnesses to the deed from Samuel and wife to James, and to the other deed, of same date, from the former to the old lady. The consid-

eration of the former deed was \$2,000; some money was paid, and two notes given for the residue. Did not hear Mrs. Hatton make any objection to signing the latter deed. James Hatton resided with his mother, and attended to her business, from 1829 until her death. He was an economical and industrious man, and a good manager. His services, and his slave (Joe), were worth \$425 a year. He was engaged in no other business than attending to the old lady's.

Sally Jamar, (sister of James Hatton).—Before Landman and Julia were married, witness was at her mother's house one day, when the land was spoken of; Sam told the old lady that they wished to buy the land for James,—that James wanted it for himself; that the old lady replied, she was willing for it to be bought for him, provided it could be paid for without getting her in debt, or selling her negroes; she complained that she could not ascertain from James what her cotton crop sold for,—that her money paid for the land. Did not hear anything said about his services. Heard the old lady tell James that her money paid for the land; he claimed the land, but admitted that it was paid for with her money.

James W. Allen.—Wrote the deed, by which James Hatton of the one part, and Landman and wife and Lynch and wife of the other part, in consummation of a contract, exchanged their interests in certain lands descended to them from their mother. "When about to write the deed, I called for the description, &c., and having received it for the one quarter-section only, I asked what became of the balance of the old tract; and James Hatton replied, in the presence of some (can't certainly say all) of the parties, "The other part of the land is mine, I have the title to it, and paid for it myself," or "I paid for it with my own money,"—that does not belong to the estate." Witness accordingly wrote the deed for the one quarter-section, and heard nothing more said on the subject, then or afterwards.

F. P. Ward.—Acted as Mrs. Hatton's agent in the sale of the land to Toney. Advertised it for sale in the Huntsville Democrat. Told Landman what Toney had offered for it; the latter then set up no claim to the land, and said that the widow ought to sell. Had a subsequent conversation with him, and told him that he (witness) had heard Allen say, that

at the division of the old lady's property James Hatton claimed the land as his own, in the presence of complainants, and that no objection was made; Landman replied that it was true. Witness inquired why he had not set up a claim to the land in the lifetime of James Hatton; his reply was, "that he did not know that the land was purchased for James Hatton's mother, and with her money; he said, James Hatton always claimed the land, and concealed the fact that it was bought for his mother."

There were three subscribing witnesses, R. Brewer, M. A. Lewis, and Alexander Ross, to the deed of Samuel Hatton and wife to James Hatton, for the south-east quarter of section four, township five, and range two west; but the two first named only were examined as witnesses.

On final hearing, on bill, answer, and proof, the chancellor rendered a decree for the complainants, except as to the eighty-acre tract; and his decree is now assigned for error.

BRICKELL & CABANISS, for the appellant, made these points:

1. Mrs. Hatton being charged by the bill with knowledge of the facts out of which the claim to relief grows, her answer is evidence for her, until contradicted by two witnesses, or by one witness with corroborating circumstances.—*Fenno v. Sayre & Converse*, 3 Ala. 478; *Branch Bank at Huntsville v. Marshall*, 4 *ib.* 64; *May v. Barnard*, 20 *ib.* 209.

2. There is not that conformity between the allegations and proof, which is required by the strict rule to which this court has uniformly adhered.—*Paulling v. Lee*, 20 Ala. 768; *Evans v. Battle*, 19 *ib.* 401; *McKinley v. Irvine*, 13 *ib.* 693; *Duren v. Parsons*, 3 Port. 363; also, *Forsyth v. Clark*, 3 Wend. 655.

3. The evidence in the case, consisting chiefly of loose declarations or acknowledgments, is not sufficient to establish a resulting trust; especially after so great lapse of time, when no excuse for the delay is shown.—*White & Tudor's Leading Cases in Equity*, vol. 1, p. 200; *Lench v. Lench*, 10 Vesey, 517; *Baker v. Vining*, 30 Maine, 126; *Bryan & McPhail v. Cowart*, 21 Ala. 91; *Jemison v. Graves*, 7 Blackf. 447.

ROBINSON & JONES, and C. C. & J. W. CLAY, *contra*, contended,—

1. That, since the bill does not charge the defendant with personal knowledge of the transaction out of which the trust arises, and the denials of the answer are made upon information and belief, one witness is sufficient to establish the trust.

2. That, though there is some immaterial discrepancy in the testimony, the fact that the land was purchased and paid for with the money of Mrs. Frances Hatton is clearly proved; and this fact being established, a trust results to her, which, since her death, enures to the benefit of the complainants, as her devisees.—2 Story's Equity, § 1201; 2 Sugden on Vendors & Purchasers, m. p. 135; Willis v. Willis, 2 Atk. 71.

RICE, J.—The resulting trust alleged in the bill is a mere creature of equity, founded upon presumptive intention, and designed to carry that intention into effect,—not to defeat it. It will not attach in the person who supplies the purchase money, if it was not the intention of either party that the estate should vest in him or her. It will not be raised in opposition to the declaration of the person who advances the money, nor in opposition to the obvious purpose and design of the transaction. The presumption of such a trust does not arise, from the mere fact that the purchase money is supplied by a *parent*, and the conveyance taken in the name of *the son*, who is not shown to be provided for.—1 White & Tudor's Lead. Cases in Equity, 204.

It is conceded, on all hands, that no such trust is proved as to the eighty-acre tract described in the bill; but it is contended that such trust is proved as to the quarter-section conveyed by Samuel Hatton to James Hatton on the 11th February, 1834. And that is the only matter which we are called upon to examine and decide.

There is evidence that the price really paid for the quarter-section was one thousand dollars; that James was an economical and money-making man, and a good manager; that his mother (a widow) had the benefit of his undivided attention to her business, from 1827 or 1828, until her death in 1841; that during that period he attended to no other business; that she also had the services of his only slave on her plantation, until the last of the year 1839; that these services of James and his slave, up to February, 1834, (when the conveyance of the

land was made to James,) were worth a much larger sum than the price paid for the land. There is no proof that James ever received any compensation for these services, unless the money paid for the land, or the land itself, was regarded and treated as such compensation.

Mrs. Jamar (a sister of Samuel and James Hatton, and of the female complainants) testifies that, before the land was conveyed to James, she was at her mother's, when the land was spoken of; that Samuel then told her mother they wished to buy the land *for James*, that *James wanted it for himself*; that her mother replied, she was willing for it to be bought *for James*, provided it could be paid for without getting her in debt or selling her negroes. There is no proof, or pretence, that the purchase of the land did get her in debt, or cause the sale of any of her negroes.

There are three subscribing witnesses to the conveyance of the land to James. One of them is not examined, and no reason is shown for this omission. The testimony of the other two does not even tend to prove any thing like a resulting trust for the mother of James, but, on the contrary, tends to prove that the purchase was made for him.

There is evidence that, when the mother of James told him that her money paid for the land, he admitted that fact, but *claimed the land as his own*; that she knew he claimed the land as his own; that, soon after her death, he took actual possession of it, and claimed and used it as his own, until his death in March, 1847, and devised it to his widow, who continued in possession until she sold and conveyed it to Toney, a *bona fide* purchaser without notice of any opposing claim to it; that some (if not all) of the complainants knew that James claimed the land as his own before his mother's death, and continued to claim and use it as his own after her death; that complainants were of lawful age as far back as 1834; and that Nancy Hatton did not marry John M. Lynch until after the death of her mother, Frances Hatton.

The bill was not filed until October, 1850, more than sixteen years after the conveyance to James, more than nine years after the death of his mother, about three years and a half after his death, and nearly a year after the sale by his widow to Toney. No excuse for this long and remarkable

delay in asserting their claim is proved by the complainants. They allege ignorance of the facts on their part, and concealment of the facts on the part of James Hatton; but this allegation is disproved.

Mr. Acklen testifies, that James Hatton, "some time in the year 1835, a short time before the date of his mother's will," had a conversation with him "relative to a tract OR TRACTS of land lying in Madison county;" and that James then stated "that the legal title to *said lands* was in him, but that *it* was purchased with his mother's money." If it is conceded that James Hatton made this statement in relation to the quarter-section described in the bill, it is insufficient to support the claim of complainants, as asserted in their bill, when taken in connection with the fact that James was *the son* of Frances Hatton. For, when the title to land is taken to a *son*, and the purchase money is supplied by *the parent*, the purchase is deemed *prima facie* as intended as an advancement, so as to rebut the presumption of a resulting trust for the parent. 2 Story's Eq. Jur. §§ 1201, 1202.

But the date of the will of Frances Hatton is July, 1838, which proves that Mr. Acklen makes a mistake of about three years as to the date of the will, although it was written by himself! We have no doubt of his honesty, but we have as little doubt that he is mistaken as to this date. And we believe he is also mistaken, when he says that James Hatton "assigned as a reason for that, that the wife of Samuel Hatton, from whom the conveyance was made, *would not consent to unite in a conveyance with her husband to his mother, on account of some family ill-feeling*, but was willing to convey to James Hatton, and did so." For it is incontestably proved that, on the very day the conveyance of the quarter-section was made to James Hatton, the wife of Samuel did unite with her husband in a conveyance of another tract *to his mother!* Besides this, the subscribing witnesses who are examined clearly prove that "family ill-feeling" was *not* the reason why the conveyance was made to James Hatton.

Mr. Acklen testifies, also, that after he wrote the will, it was read over to Frances Hatton, in the presence (as he thinks) of James Hatton and James Landman; that "the subject of the land was then mentioned, as it had been left out

of the will, and it was then *agreed* by her, James Hatton, and James Landman, that it might stand in that way, as James Hatton would do what was right between his sisters, Nancy Hatton and Mrs. Landman, after she was gone, in relation to the land." The bill does not set forth *this agreement*, nor claim any right under it. But, if it did, it is clear that it could not be enforced as an agreement, because it is void for uncertainty. It furnishes no means by which the court could determine "what was right between his sisters" and James, in relation to the land.—Erwin v. Erwin, 25 Ala. Rep. 236.

But it is urged, that, although the agreement is void for uncertainty as an agreement, yet it is an admission that the land really did not belong to James, but to his mother. We cannot assent to that; for we cannot believe that an agreement by A., to do "what was right" between himself and his sisters, in relation to land which was held by him under a conveyance from its former undisputed owner, is, *per se*, an admission that the land did not belong to him but to another person.—Flagg v. Mann, 14 Pick. Rep. 481.

Besides all this, it appears that the mother of James lived more than three years after her will was written and this agreement made. Why did not she, or Mr. Landman, the husband of Mrs. Landman, during those three years, obtain from James Hatton some satisfactory evidence that he did not hold the land for himself alone, but for himself and his two sisters? If to this question it is answered, that James Hatton, by his said agreement, *fraudulently prevented* them from obtaining such evidence, or an alteration of the will of his mother, then we reply, it is very strange that this *fraudulent prevention* of acts to the prejudice of his sisters, which is a distinct and clear ground of equitable relief, is not even alleged in the bill, although James Landman, one of the parties to the alleged agreement, is one of the complainants in the bill.

A part of Mrs. Graham's testimony is very favorable to complainants, but another part is equally unfavorable to them. For "her understanding was, that there was *no real consideration* from James to Samuel, but that the lands were passed to blind Samuel's wife, so as to effect a relinquishment of dower." If this be so, it defeats the claim of the complain-

ants, which is by their bill grounded on the facts, that James did *buy* the land of Samuel, and did *pay him one thousand dollars* for it; and "that the thousand dollars, so by said James to said Samuel paid for said land, was in fact the money of said Frances." If *nothing was paid* in consideration of the conveyance of the land to James, there could not have resulted to his mother, at the time of that conveyance, any such trust as is alleged in the bill.

Mrs. Graham further testifies, that, immediately after James obtained the conveyance, he went home and informed his mother and sisters that it was made out *to him*, and gave a statement of the circumstances; which statement Mrs. Graham undertakes honestly to detail. She also testifies, that James then told the old lady, who was very deaf, "not to fret, it should all be right," and offered to make the title to her; and that the old lady said she knew James would do what was right. Although she knew that he afterwards claimed that the land was *his own*, and that he bought it *for himself*, and although she lived more than seven years after James had offered to make her the title, she never did take the title, but left it to James, with the unlimited and undefined discretion of absolute ownership in him. She practically disclaimed and renounced any and all right of disposition, control, or ownership over it, and actually refused to take from him the power of doing with the land what he thought was right, although she knew that he was willing to surrender the title to gratify her.

We are asked, now, to do what the mother of James, by his voluntary offer, had the opportunity to do for seven years before her death, but never would do! We are asked to do this, by those who claim it only as a bounty from that mother, and in her name! We are asked to do it, by those who, being of full age, and having knowledge of the material facts, in the life time of James and his mother, never made the request until nine years after the death of that mother, and more than three years after the death of that son. The laws of our country require us to pronounce the evidence insufficient to sustain such a claim. In such cases, courts of equity consider the acts of the parties as evidence of the intent, and require the complainants to sustain their claim by evidence

which is full, clear, and satisfactory.—1 White & Tudor's Lead. Ca. in Equity, 201; Gaither v. Gaither, 3 Md. Ch. Decisions, 158; Farringer v. Ramsey, 4 *ib.* 33; Bryan v. Cowart, 21 Ala. R. 92. See, also, Gascoigne v. Thiving, 1 Vernon, 366; Baldwin v. Campfield, 4 Halsted's Ch. Rep. 891.

All the evidence may be reconciled, upon the following hypothesis: That Francis Hatton was not exempt from the infirmities incident to persons far advanced in years; that she obtained from her son James that protection and care of her person and property which is so necessary and grateful to an aged widow; that she entertained for him a partiality which was natural and deserved; that she was not willing that her daughters should know of this partiality; that, from the time of this conveyance to James until her death, she really intended that he should have the land for himself, and should do with it what he thought was right; that by her assent he really bought the land for himself; and that, with an affection worthy of all commendation, he held his time, his talents, and his property, subject to any disposition which would secure to her the greatest amount of tranquillity and gratification.

Upon this hypothesis, his declarations and her declarations can be reconciled with the non-existence of the alleged resulting trust, or with its waiver and discharge by her before her death, if it ever did exist.

It is due to all the witnesses to say, that we concede to them purity of intention, but not infallibility, especially in the narration of declarations made many years ago, and in which they had no possible interest.

A decree must be entered here, reversing the decree of the chancellor, and dismissing the bill; and the complainants must pay the costs of this court, and of the court below.

MAY'S HEIRS vs. MAY'S ADM'R.

[PROCEEDINGS HAD ON ADMINISTRATOR'S PETITION FOR DIVISION OF SLAVES.]

1. *Appeal lies from final decree of distribution, on proceedings instituted by personal representative.*—An appeal lies from a final decree of the probate court, confirming the report of commissioners appointed to make a division of the slaves belonging to an estate among the persons entitled under the will, although the proceedings were instituted by the personal representative, and not by a legatee or distributee.—Code, § 1888, ¶ 4.
2. *Deposition of sole witness.*—When the claim or defence, or a material part thereof, depends exclusively on the evidence of a single witness, his deposition may be taken (Code, § 2318, ¶ 5), and may be read on the trial, although he resides within one hundred miles of the court.
3. *Objection to entire deposition, when made.*—An objection to an entire deposition, on account of defects in the commissioner's certificate, must be made (Code, § 2328) before the trial commences, and comes too late afterwards, though made as soon as the deposition is opened by the court.
4. *Jurisdiction of probate court over ademption of legacies.*—Although there may be cases, involving equitable circumstances, which the probate court, from its peculiar organization and mode of procedure, would be incompetent fully to adjust; yet it has jurisdiction over the ademption of legacies, as incident to the settlement and distribution of estates.
5. *Admissibility of parol evidence to show whether advancement was intended as satisfaction of provision by will.*—It is now well settled that parol evidence is admissible to show that a subsequent advancement by the testator was not intended as a satisfaction, in whole or in part, of a previous provision by will; and whenever such evidence is admitted for this purpose, it may be rebutted by similar evidence.
6. *Ademption of legacies by subsequent advancement.*—Testator, after providing for the payment of his debts, directed that "the entire residue" of his property, consisting of lands, slaves, and other property, should be equally divided among his wife and children, and declared that it was his "settled purpose" to make them all equally interested in his estate. The share of his only married daughter he directed should be divided between her and her husband, one-half being secured to her as her separate estate, and the other half vesting absolutely in her husband. Afterwards he made advancements, consisting of lands, slaves, and other property, approximating in value the share which each would take under the will, to this daughter, another daughter then married, and his eldest son, who were the children of his first wife; and there was parol evidence (by two witnesses) of his subsequent declarations that this was independent of the provision made for them by will, that most of his property had come by their mother, and that he felt it his duty to give them more than his other children. *Held*, that the advancements were a satisfaction, *pro tanto*, of the provisions by will.

APPEAL from the Court of Probate of Greene.

JOHN MAY died, in Greene county, in 1853, after having made and published his last will and testament in writing, dated April 25, 1849, and attested by three witnesses, which was duly admitted to probate on the 27th June, 1853, and which contained the following provisions :

The first clause directed the payment of all his just debts; the sixth clause appointed his son, Pleasant May, and his son-in-law, James A. Moore, as his executors; and the other clauses were in the following words: "*Secondly.*—After the payment of my debts, as directed above, I desire that the entire residue of my property, of every description, whether real, personal, or mixed, in possession, remainder, or reversion, be equally divided between my wife, Virginia, D. May, and my children, Pleasant May, Mary Ann Moore, and Sarah D. T. May, of my first marriage, and Edwin P. May, Sidney M. May, Willie V. May, Augustus May, and Virginia D. May, of my present marriage, share and share alike, and in all respects equal. *Thirdly.*—It is my will and desire, that the part of my estate hereby bequeathed to my daughter Mary Ann Moore may be equally divided between her and her husband, James A. Moore; that is, that one equal half of said portion be vested in James A. Moore, absolutely, and free from the operation of the present law of the State for the benefit of married women, and that such portion as aforesaid be subject to the entire control of the said James A., and to alienate by him without limitation or restraint; but, of the entire portion falling to the share of the said Mary Ann and James A., the said Mary Ann is to make her own selection of such property as shall constitute the half of the same which she is to receive, at a fair valuation, and then such portion is to be held for her separate use and benefit, and to be in no way liable for any debts or contracts by the said James A. Moore whatever. *Fourthly.*—I further desire that, in the event of the death of the said Mary Ann Moore, without children, then, and in that case, her entire portion of my estate shall pass, absolutely and in fee simple, to her said husband, James A. Moore, forever. *Fifthly.*—Should other children be born to me, as my family may yet further in-

crease, then I desire that all such children may have an equal interest in my estate with those already named, as it is my settled purpose to make my wife above named and all the children I may have equally interested in my property. And the provision herein made for the benefit of my said wife is in lieu of all right to be endowed in or of my said estate, or any other provision in the laws of the State for the benefit of widows. It is made, too, in the confident hope that it will be ample for her support and comfort through life."

The executors named in the will having renounced their right to qualify, letters of administration, *cum testamento annexo*, were granted to Sydenham Moore. On the 13th November, 1854, said administrator petitioned the court of probate for the appointment of commissioners to make a division of the estate; and the court appointed five commissioners to divide the slaves belonging to the estate. The commissioners reported their proceedings to the December term of the court; and the minor children, by their guardian *ad litem*, within thirty days afterwards, filed their exceptions to the report. The substance of these exceptions was, that the commissioners had allotted to Mary Ann Moore, Sarah D. T. Croom (formerly May), and Pleasant May, respectively, an equal share with the other children, without making any deduction for advancements which they had received from the testator subsequent to the execution of his will. A day was appointed for the hearing of these exceptions; and on the trial a bill of exceptions was sealed, at the instance of the minor children, by their guardian *ad litem*, which presents the matters now assigned for error.

"At the hearing of said exceptions, proof was offered by the said minor heirs, by their guardian *ad litem* and next friend, to show that said John May died in May or June, 1853, leaving his widow, Virginia D. May, and his children, Pleasant, Mary Ann, the wife of James A. Moore, Sarah D. T., the wife of Platt S. Croom, Sydenham, Willie V., Augustus, Wiley C., John C., and Edwin P., of whom the six last named were the children of his second wife, and were under the age of twenty-one years; that Edwin P. died after the death of his father; that said Moore married said Mary Ann, a daughter of said testator, in 1847, and that they lived at

said testator's house, and with his family, until the year 1850; that said Croom married said Sarah in 1850; that said testator, in the fall of the year 1849, gave to Moore and wife property, consisting of lands, negroes, stock of horses, mules, &c., valued at \$10,000; that at the same time he gave to his son, Pleasant May, property consisting of lands, negroes, stock of horses, mules, &c., valued at \$10,000; that in the fall of 1850, or in the spring of 1851, he gave to his daughter Sarah and her said husband property, consisting of lands and negroes, valued at \$9,000." They then read in evidence, the last will and testament of said John May; "after which the administrator offered the deposition of E. M. Boykin, which was then opened by the court. Thereupon, the said minor heirs, excepting by their next friend and guardian *ad litem*, moved the court to reject said deposition, because, 1st, the said witness resides within one hundred miles of the place of holding the court; 2dly, the witness did not sign his testimony as the law requires; and, 3dly, the certificate of the commissioner is insufficient, because he does not certify, 1st, to the identity of the witness, or that he signed his testimony in his presence, and, 2dly, that he wrote down the answers of the witness as nearly in the language of the witness as he could, or that he caused it to be done by any other person, or that the witness himself wrote down the same; and, 4thly, because the commission issued on an insufficient affidavit." This deposition was taken on the affidavit of the administrator's attorney "that a material part of the defence depends exclusively on the evidence of said Boykin." The court overruled the motion to exclude, and the minors heirs excepted.

Said Boykin's testimony was as follows: "In the fall of the year 1851, I was riding with John May, in a buggy, to the plantation of Pleasant May. While on the road, he told me of his family difficulties, and spoke very freely. He said that his two female children by his first wife had been refused visiting him by his second wife, and many other things of like nature. He stated to me, also, that he had given his three children by his first wife a certain quantity of lands and negroes, (not naming how much, or how many,) which he intended them to have independent and exclusive of what he had given them by his will; that it was his intention, besides what

he had given each of these three children, that they should come in equal with the other children, after his death, in the division of his property, both real and personal. In this conversation, he expressly named Pleas., Mary Ann, and Sarah. He did not state the amount of property, but said that he had given each of his children by his first marriage a certain amount in land and negroes, independent of what they would receive at his death." This witness further testified, that he resided in Dallas county, fifty-seven miles from Eutaw. The minors objected to the reading of this deposition, on the ground that the evidence was "illegal and inadmissible"; but the court overruled their objection, and they thereupon excepted.

The administrator then introduced one Henry Harless as a witness, "who stated, that he knew John May in his life time, had known him since 1836, and was intimate with him, and that May conversed often and freely with him. Witness did business for May as overseer, for five years, and was on his upper plantation, known as the 'Griswold & Garnet place,' on which about sixty hands were sent to the field,—about eighty in all. Knows the testator's children, but did not know his first wife. In 1850, said May gave his daughter Sarah, Platt Croom's wife, certain property. Remembers a conversation which took place between said May and himself after the property was given to Croom's wife. Witness told him, that he had not given as valuable negroes to Croom and wife as he had to Moore and Pleasant May. *Witness (?)* had a list of negroes, when he was conversing about them, which he showed to *witness. (?)* Witness called the attention of testator particularly to two negroes, which he had given to Croom and wife. Testator said, his daughter had chosen one of them; also, that there was a day coming when he would make it all up,—that this was not all they would get. Testator told witness more than a dozen times, first in 1845 or 1846, that he felt it his duty to give his three oldest children more property than his other children; that his property, or most of it, had come by his first wife,—that she had helped him to make it. Witness heard testator say this in 1848. Moore's wife, Croom's wife and Pleasant May were the children of testator by his first wife. The said parties, by their

next friend and guardian *ad litem*, objected to so much of the testimony of said witness as commences with the conversation had between himself and said testator, and the statement of such conversation deposed to, as being illegal and inadmissible; but the court overruled their objection, and admitted the testimony; to which they excepted."

This witness, on cross-examination, testified as follows: "Last conversation with May about the subject was in spring of 1850, shortly after he had given negroes to Sarah Croom. He showed me the list he had given. First three years I lived with May, sixty hands went to field; eighty on the place. Mrs. May was present during all, or part, of conversation in 1850. May did not say he had made a will. In 1848, I lived on McNully place; in 1847, went to North Alabama. I lived with Mr. May, as an overseer, in 1843, '44, '45, and '46, and went back to live with him in 1848. Moore, May's son-in-law, lived with him in 1847. In 1849 Croom and Moore farmed together. Moore then lived at May's house. A very short time after May gave negroes to Croom and wife, when conversation in 1850 occurred. Don't know what was the value of May's property. Negroes were low in 1843, and did not rise much till 1849. Don't know what negroes were worth, or would hire for, in 1849."

The minor heirs then offered to read, as rebutting evidence, a paper which was admitted to be in the handwriting of said testator, purporting to be his last will and testament, dated June 20th, 1852, and signed by the testator, but not attested by any witnesses. In this paper the testator stated that he had made advancements, "about equal, in real and personal property," to his three eldest children, Mrs. Moore, Mrs. Croom, and Pleasant May, and directed that equal advancements should be made to his widow and each of his other children; and the fifth clause contained this additional provision: "After my wife and now minor children shall have been advanced equal to my first three children, then, and in that case, the residue shall be equally divided among all my children then living." The administrator objected to this paper being read in evidence, on the ground that it was illegal and inadmissible, and the court sustained his objection; to which ruling the minor heirs excepted.

"After argument heard, the court overruled the exceptions to the commissioners' report, and ordered the report to be confirmed."

All the rulings of the court to which exceptions were reserved are now assigned for error. On the part of the appellee a motion was submitted to dismiss the appeal, on the ground that it was not authorized by the provisions of the Code.

WEBB & INGE, for appellants, made these points:

1. Where a parent bequeaths a legacy to a child, and afterwards gives a portion, or makes a provision for the same child, it will be presumed to be in lieu of the legacy, although not so expressed, whenever it is equal to or exceeds the amount, is not contingent, and is of the same nature; and where the portion advanced is less than the legacy, it will operate, at least, as an ademption, *pro tanto*, of the legacy.—2 Williams on Ex'rs, 1143; 2 Story's Equity, § 1111; Roberts v. Weatherford, 10 Ala. 75; Hartop v. Whitmore, 1 P. Wms. 681; 18 Vesey, 150; Clarke v. Burgoyne, 1 Dick. 353; 15 Pick. 136; 2 Amer. Lead. Cas. Eq., 458. Even if it be determined that a portion, *ex vi termini*, must be a definite sum; still, if it is a provision by a parent for a child, the same presumption of satisfaction arises.—Bouvier's Law Dictionary; cases cited *supra*. The testator himself settles this question, by defining the bequest to Moore and wife, which is the same as the others, as a portion. Even in cases of the bequest of a residue, which was formerly an exception to the general rule, the same presumption arises, when it can be ascertained that the testator intended it as a portion. But the bequests in this case are not of a *residue*, as that term is used in this connection. No other devises are made; no other legacies are given; nor is any portion of the estate otherwise disposed of. The direction for the payment of debts is nothing more than the law itself would require.—Bengough v. Walker, 15 Vesey, 507; Thynne v. Glengall, 2 Cases in House of Lords, 131; Roper on Legacies, 374, 377.

2. The modern doctrine, in relation to the admission of parol evidence of the testator's intention, is identical with that which governs in the interpretation of other instruments.

Greenl. Ev., § 298. It is now settled that such evidence is only admissible for the purpose of showing what the testator meant by the act subsequent to the will (Williams on Ex'rs, 1145; Hall v. Hill, 1 Dr. & War. 116); and to render the testator's subsequent declarations admissible for this purpose, they must be made contemporaneously with the advance, so as to constitute part of the *res gestæ*.—Kirk v. Eddowes, 3 Hare, 509; 15 Pick. 133; Williams on Ex'rs, 1145. Tested by this rule, the testimony both of Boykin and Harless was inadmissible, as the declarations to which they deposed were made subsequent to the advancements. Even if this testimony was admissible, it was entitled to but little weight.—18 Vesey, 150; 2 Lead. Cas. Eq., 421.

3. But, if the testimony of Boykin and Harless was admissible, the court erred in excluding the paper which was offered as rebutting evidence.—Kirk v. Eddowes, 3 Hare, 509; Williams on Ex'rs, 1143.

4. The court erred in overruling the motion to suppress the deposition of Boykin, for the reasons assigned when the motion was made. The witness resided within one hundred miles of the court; and though his deposition [was taken on the ground that he was the only witness by whom a material fact could be proved, yet, if alive, he ought to have been produced. Besides, the commissioner's certificate is defective in the particulars specified.—Code, §§ 2322, 2323, 2327.

S. F. HALE, with whom was WM. M. MURPHY, *contra*:

1. The appeal ought to be dismissed, because this is not one of the cases specified in the statute granting appeals.—Code, § 1888.

2. The objection to the deposition of Boykin came too late. Code, § 2328. The affidavit on which the deposition was taken is clearly sufficient.—Code, § 2318, ¶ 5.

3. The probate court is one of special, limited jurisdiction, created by statute, and restricted to its statutory grant of powers and jurisdiction. Jurisdiction is granted to it over the settlement and distribution of estates, and over the subject-matter of advancements by an intestate to his children; but there is no grant of any power over the subject-matter of the ademption of legacies. The conclusion, therefore, is irre-

sistible, that it has no such jurisdiction. The whole doctrine of the ademption of legacies is the creature of equity, and all the cases to be found in the books, except that of Roberts v. Weatherford, 10 Ala. 75, (in which the question of jurisdiction was not raised,) arose in the chancery courts. The probate court has no chancery jurisdiction, but is governed by strictly legal principles. It is bound to settle all estates according to the legal rights of the parties interested, either under the testator's will, or, in case of intestacy, under the statute of distribution; and if any party has equitable rights, he must resort to the proper tribunal to enforce them.—2 Story's Equity, § 1109; Billingsley v. Harris, 17 Ala. 214.

4. The whole doctrine of the ademption of general legacies is founded on the presumed intention of the testator; and the weight of authorities has now settled the doctrine, which was condemned by Lord Eldon and other eminent jurists in the earlier cases, that a general legacy by a father to his child, for a sum certain, is adeemed, or satisfied, by a subsequent advancement, when the legacy and advancement are *ejusdem generis*.—Roper on Legacies, m. pp. 366–75; 2 Williams on Ex'rs, 3d Am. ed., p. 1143. But there is an exception to the rule, which is as well founded as the rule itself—viz., that the doctrine of ademption will never be applied, where the legacy is of a residue, or a part of a residue, or is for an uncertain or indefinite sum. The reason of this exception is, that the presumption being always raised against the direct provisions of the will, the law will not presume the absurd intention that a definite sum should be given in lieu of an indefinite and uncertain sum.—Roper on Legacies, m. p. 377; 2 W'ms on Ex'rs, 1144; Farnham v. Phillips, 2 Atk. 215; Freemantle v. Bankes, 5 Vesey, 85; 4 Bro. Ch. 369; 2 Story's Eq., § 1115.

Again; the doctrine of ademption applies only to legacies of personalty, and has no application whatever to devises of realty.—Roper on Legacies, 378; Jarman on Wills, 178; 2 W'ms on Ex'rs, 1143; 12 U. S. Digest, 204, § 325. How, then, can the respective shares of the three oldest children in the personal estate, which is by law first subject to the payment of debts, be determined, so as to know the amount of the legacy to be adeemed? The advancement must also be personalty, because the presumption of satisfaction will not

arise unless the portion and advancement are *ejusdem generis*. Holmes v. Holmes, 1 Bro. Ch. 555; Davys v. Boucher, 3 Y. & Coll. 411; and cases cited *supra*. How much of the advancements consisted of personalty the record does not disclose, nor can this court determine.

But, for another reason, the legacies to Moore and wife cannot be adeemed by the subsequent gift to them—because the two provisions are not in favor of the same person. Under the will, one half of Mrs. Moore's share is given absolutely to her husband, and the other half to herself, during her life, as her separate estate; while, under the gift, the whole property vested absolutely in her.—Hooper v. Smith, 23 Ala. 639.

5. The testator's declarations, as proved by Boykin and Harless, were admissible evidence; not on the principle of *res gestæ*, but as statements or admissions of the ancestor, through whom the appellants claim, made before their rights attached. He was the only person on earth who knew what he intended, and was the only person who had a right to control the matter. Such declarations, whether made at the time of the gift, before, or afterwards, are admissible, to repel the presumption of an intended ademption.—Ellison v. Cookson, 5 Vesey, 84; Debeze v. Mann, 2 Bro. Ch. 137; 7 Vesey, 517; 2 Story's Equity, § 1114; Roper on Legacies, 391; W'ms on Ex'rs, 1143-4; 3 Phil. Ev., C. & H.'s Notes, p. 1494, § 8; Howell v. Barden, 3 Dev. 444; Reel v. Reel, 1 Hawks, 248; Walkup v. Pratt, 5 Harr. & J. 51-8.

6. The paper which was offered as rebutting evidence showed on its face that it was incomplete; and being inoperative as a testamentary paper, it was invalid for ever purpose. 1 Pick. 535; 1 Jarman on Wills, 185.

CHILTON, C. J.—1. Since this case was argued, a brief has been submitted, on the part of Mr. Murphy, insisting that the appeal should be dismissed, on the ground that it is not warranted by the Code; but we think the objection cannot be supported. As to the property distributed, the decree of the court confirming the report of the commissioners appointed to make distribution, and ordering it to be made accordingly, is final, (Code, § 1798); and we think an appeal

lies, in all cases, where a distribution of an intestate's estate is made among distributees, and they should be dissatisfied with such distribution. Whether the estate was ordered to be distributed at the instance of the legatees or distributees, or of the administrator, can make no difference. True, a literal construction of the 4th clause of section 1888 of the Code would seem to indicate that the proceedings there mentioned, from which an appeal lies, should be commenced and prosecuted by legatees or distributees. But, we apprehend, the true meaning and spirit of the section is, that whenever proceedings are commenced and prosecuted for the payment of legacies, or the distribution of estates, no matter by whom, if the court commits an error, the legatee or distributee has the right of appeal. The injury is the same which would arise out of erroneous proceedings, whether set on foot by the executor, or administrator with the will annexed, or by the persons entitled to the distributive share or legacy. Without stopping to inquire whether the motion does not come too late, after the defendants have joined in error and argued the case upon its merits, we are satisfied the motion to dismiss the appeal should be overruled.

2. Before proceeding to discuss the main question, it is proper to determine whether the deposition of Boykin should have been admitted. Section 2318, clause 5, provides that the evidence of a witness may be taken, in a civil case, by either party, "Where the claim or defence, or a material part thereof, depends exclusively on the evidence of the witness." The affidavit to take Boykin's deposition states that on his evidence a material part of the defence depends exclusively, and is a substantial compliance with this provision of the Code.

3. It is needless to examine the objections to the sufficiency of the commissioner's certificate. The motion went to the exclusion of the entire deposition, and was made after the parties had entered upon the trial. Section 2328 of the Code requires that, where the objection appears upon the deposition, it must be made before the parties enter upon the trial. The objection, therefore, came too late, and was properly overruled.

4. Another preliminary question has been raised by the

counsel for the appellees; namely, that the probate court has no jurisdiction to pass upon questions of ademption of legacies. It is urged that, from the limited and special jurisdiction of this court, it must be confined to the execution of the will according to the *legal* rights of the respective parties, and cannot rightfully adjudicate upon matters proper for equitable cognizance. We readily concede, that there may be cases, involving equitable circumstances, which, from the organization and mode of procedure of the court, it would be incompetent fully to adjust; but, having full power to order distribution of estates, and the payment of legacies, it clearly has the power; as incident to this jurisdiction, to determine the shares of the distributees, and whether the legacies are valid charges upon the estate, or have been satisfied or adeemed. The jurisdiction is fully sustained by the case of *Harrison v. Harrison*, 9 Ala. Rep. 470; see, also, *Smith v. Smith*, 21 Ala. Rep. 761. The question whether the legacies to the three children of the testator by his first wife are adeemed or satisfied, in whole or in part, by the subsequent advancements of property to them, is one which naturally and legitimately pertains to the proper execution of the will and the due administration of the estate; and although the powers and jurisdiction of the probate courts are limited, yet they necessarily extend to questions of this kind, as indispensable to the proper settlement and distribution of estates.—See *Smith & Loveless v. Hall*, 20 Ala. Rep. 777.

5. We come, then, to the main question discussed at the bar, namely, whether the legacies to Moore and wife, Mrs. Croom and Pleasant May, are to be considered as satisfied, in whole, or *pro tanto*, by the portions given them off by the testator after making his will. And we would first take occasion to say, that it is now too well settled to be disputed that parol testimony is admissible, in cases of this kind, to show that the testator did not intend by the subsequent provision to satisfy that previously made in his will.—*Biggles-ton v. Grubb*, 2 Atk. Rep. 48; *Rosewell v. Bennett*, 3 *ib.* 77. In the case last cited, Lord Hardwicke said, he was of opinion that the plaintiff ought to be let into this evidence to show the testator's intention, and that it had been done in several cases; one before Lord King, one before Sir Joseph

Jekyll, and another before himself,—alluding to the above case.—See *Chapman v. Salt*, 2 Vern. Rep. 646; *Pile v. Pile*, 1 Cha. Rep. 199; *Mascal v. Mascal*, 1 Ves. 323; *Ellison v. Cookson*, 2 Bro. Ch. Rep. 307; *Shudal v. Jekyll*, 2 Atk. Rep. 518; 3 Bro. Ch. Rep. 61; 1 *ib.* 296; *Williams on Exr's*, 956, mar.; 7 Ves. 508; 9 *ib.* 577; 4 Madd. Rep. 420; 2 Russ. & M. 310; 6 Sim. 528. The object of such proof is not to change the will, or give to the language employed a meaning different from that which it ordinarily and appropriately has, but merely to show that the testator has not executed or satisfied some bequest contained in it, in whole or in part. The proof, in other words, does not alter, add to, or change the will, but is admitted to show with what intent the subsequent portion, gift, or advancement was made.—See, *Jeacock v. Falkner*, 1 Bro. Ch. Rep. 296; 1 Greenl. Ev. § 296.

“There are,” says Mr. Gresley, “certain classes of cases, in which parol evidence has been allowed incidentally to affect the construction of wills, on the ground that a presumption may be rebutted, and then, *e contra*, corroborated, by any kind of evidence.” He cites, as the simplest illustration of the rule, the admission of parol evidence to show that two legacies, coinciding in amounts and in the expressed motives, which the law presumes not to be accumulative, were so intended by the testator.—Gres. Eq. Ev., 209–210. “The effect of such evidence,” says Sir John Leach, V. C., in *Hurst v. Beach*, 5 Madd. 350, “is not to show that the testator did not mean what he said, but, on the contrary, to prove that he did mean what he has expressed.”—See, also, *Coote v. Boyd*, 2 Bro. C. C. 521; *Masters v. Masters*, 1 P. Wms. 424; *Roper on Legacies*, by White, p. 317; 6 Cruise's Dig., tit. 38, ch. 6, §§ 45–57; and notes by Prof. Greenleaf. Whenever such parol evidence is admitted, the opposite party has a right, as a matter of course, to rebut it by similar proof.

Whether such parol proof, if consisting, as in this case, of parol declarations, should not be limited to declarations accompanying the gift or advancement, and explanatory of it, thus forming part of the *res gestae*, is a question which, under the view we take of this case, it is unnecessary to decide, inasmuch as, giving the appellees the advantage of the proof, the result is unaffected by it.

6. Upon the question whether the legacies to the three oldest children are adeemed by the subsequent gifts to them of land and negroes, we have had some difficulty. The testator expressly declares in his will, that it is his "*settled purpose*" to make his wife and all his children "*equally interested*" in his property. He suffers this will to stand, unaltered by codicil or otherwise. The courts of chancery always regard the circumstances of the case, in endeavoring to arrive at the true meaning and intention of the testator; and incline against any construction which would give some of the children double portions, to the partial exclusion of others, whose claims upon the testator's bounty are equally meritorious. *Bellasis v. Uthwatt*, 1 Atk. Rep. 427, marg. p. What did the testator intend by giving off portions to his three oldest children? The daughters were married, and all of the three children were grown, and to be settled off. It was, therefore, very natural for the parent to give them such amounts of his property as would approximate their respective shares of his estate as provided for in his will.

True, the deposition of Boykin, and the evidence of the witness Harless, show that, subsequently to apportioning off some \$10,000 worth of property, consisting of land and negroes, to each of his three oldest children, the testator said that this provision was exclusive of the provision he had made in his will,—that they were children of his first wife, that she had assisted him in making it, and that he intended to give them more than he did to his younger children. It must be borne in mind that none of these declarations were made contemporaneously with the advancements. What was said *at that time* is not proved by any witness. It is hardly probable that, in a matter of such importance as the giving off of thirty thousand dollars worth of property, to three out of nine children, all equally provided for in his will, the testator would have left himself without a *witness to the transaction*, had he designed these portions to be exclusive of the provision made by his will. The most natural and reasonable inference, even to a person unacquainted with the law, would be, that giving off to these three legatees portions of his estate which he had disposed of by his will, approximating the shares to which they would be entitled under the

will, was intended to be a satisfaction of the bequests to them, at least to the extent of the property thus apportioned; and with this the law agrees. The testator must have been apprised of this; and yet the only evidence that the advancements were intended to be accumulative consists of loose declarations, made by the way, liable to be misreclected, as well as misapprehended, by those who heard them, and which, if made precisely as stated, may have been the result of momentary impulse, growing out of a recurrence to family difficulties to which the testator alluded, as deposed to by one of the witnesses. In view of this, we should feel that we were not warranted in thwarting the purpose of the testator, the *settled purpose* solemnly announced in his will, of giving his children "an equal interest in his estate." Equality is equity; and if the testator, after this solemn announcement, did not intend to do equity as between his children, having, so far as this record discloses, equal claims upon his bounty, we repeat, that he would, no doubt, have furnished more unmistakable evidence of his intention than loose, or, it may be, hasty declarations by the wayside.

But it is argued, that the bequests to the children, and the portions given off or provisions respectively made for the three oldest, cannot be regarded as a satisfaction the one of the other, either in whole or in part, because, 1st, the provision by will is for a *residue*,—is uncertain—may amount to largely more than the provision made by the gift of the testator, or may amount to nothing. We have no disposition to controvert this doctrine in the case before us, for we do not consider the portions provided for in the will as falling within the designation of residue, as that term is understood in this connection. Here, the testator, possessed of a large estate, and but little in debt, so far as we are informed by the record, desires that his debts should be first paid, and that his remaining property should be equally divided. The shares bequeathed are equal shares of *his entire property*. If the fact that the debts are first to be paid changes the bequests into a residue, then, as the law requires the debts first to be paid, and charges the whole estate, both real and personal, with their payment, every bequest, necessarily being out of what remains, would, in this sense, be a portion out of a residue,

and, in such case, there could be no presumed satisfaction of such bequest by subsequent gift *inter vivos*. Such is not the law, with respect to voluntary portions to children. But concede that the term "*residue*" is used in its technical sense, we are still of opinion, that, as the equal distribution of this residue is provided for by the will, and the respective shares constitute portions for the children, these shares may well be satisfied, in whole or in part, by subsequent provisions made by the testator in his lifetime, in setting up in life his older children. We must look to the will, which provides for equality, equality of distribution with respect to the property which the testator then had; for, if he had died immediately after its execution, it would have embraced his entire estate. We must, then, look to the character of the subsequent provisions or portions given off. These are about equal, as respects the three children advanced; and their respective shares vary, perhaps, very little from the amounts to which they would be entitled under the will. The property given off consisted of land and slaves, the same property bequeathed and devised to be shared equally between all the children, not specifically, but generally. Thus, taking a common-sense view of the conduct of the testator, interpreting it according to our experience of the ordinary transactions of mankind, we feel constrained to hold, that the portions given to the older children were so much advanced to them of the provision made for them by the will. This accords not only with justice, with the settled purpose as declared by the testator in his will, but with the policy and spirit of our law as evidenced by our statutes, requiring advancements to be brought into hotchpot—not allowing them, if the party is willing to bring them into the general distribution, to operate as a substitute for, but as a part satisfaction of, what the children advanced would otherwise be entitled to; thus securing equality of distribution among the children.

Had the amounts advanced been inconsiderable, the presumption that the provisions were cumulative and intended so to operate, would have been much less stringent. But when the provision amounts to as much, or more, or approximates very nearly the amount to which the child would be entitled under an equal distribution as provided for in the

will, the presumption becomes very strong that the father was executing his will, in part at least; and under such circumstances, the law requires very clear and satisfactory proof that it was intended by the father to give the children thus advanced double portions. The question is one of intention; and the parent, having made his will, and having provided for the equal distribution of his property among all his children, must be supposed to have decided what, under the then existing circumstances, ought to be the portion of each child; not with reference to the wants of each, but attributing to each the share of the whole which, with reference to the wants of all, each ought to possess.—*Pym v. Lockyer*, 5 Myl. & Cr. 29. If it becomes necessary, in the opinion of the parent, after making such provision by will, to make advancements to some of the children upon their marriage, or to set them up in life, the equality provided for in the will ought not to be disturbed, except upon the clearest proof that the subsequent gifts were designed as an addition to the provision made by the will, and that such was their character *when they were made*; for, if they operated as a satisfaction, *pro tanto, when made*, we apprehend the subsequent declarations of the testator, without more, would not change their character. Such declarations are only admissible as evidence of the intention with which the subsequent advancements were made. That intention being once ascertained, they can have no effect, as they cannot change the bequests in the will.

It is objected, that the advancements and bequests are not *ejusdem generis*. This makes no difference, if it were the intention of the testator to substitute the one, in whole or in part, for the other.—*Jones v. Mason*, 5 Randolph's R. 577, and cases there cited. But the objection is not well founded in fact. The portions given off are of the very property of the testator's estate which would have been subject to division among the legatees had the testator died the day before he made the advancements. Be this, however, as it may, if it was *the intention* of the testator to execute his will, in part, by placing the older children in possession of something like the shares which would fall to them under the will, then the legacies are adeemed, *pro tanto*. The following cases show that the intention is to be looked to, and will prevail,

whether the thing given by the will and that advanced be of the same kind or not: *Hoskins v. Hoskins*, Prec. in Chan. 263; *Chapman v. Salt*, 2 Ver. R. 646; *Jones v. Mason*, 5 Rand. Rep. 557; *Richman v. Morgan*, 1 Bro. C. Rep. 63; 2 *ib.* 394; 15 Ves. 507. The objection, that the gift to Moore and wife by the will differs from that made by the testator when he gave off to them their respective portions, is fully met by this view. He was making provision for these grown and married children, to meet their then exigencies, rather than withhold their shares until after his death.

Our conclusion is, that these gifts were not designed to confer double portions, but are to be construed as in subordination to the will of the testator, and the "settled purpose" therein contained, that his children should share equally in his property. If the testator gave them as much as their shares under the will, or more, he has fully executed his will in their behalf. If he has given them less, he has executed it only in part; and the probate court should complete its execution, by making their shares equal.

Let the decree be reversed, and the cause remanded.

GODDEN vs. LE GRAND.

[MOTION TO STRIKE BILL OF EXCEPTIONS FROM RECORD.]

1. *Bill of exceptions governed by what law.*—The taking of a bill of exceptions is a "proceeding" in the cause, within the meaning of the 12th section of the Code; and therefore, in actions commenced before the adoption of the Code, the bill of exceptions must be governed by the old law, although the trial is had since that time.
2. *When seal necessary, and its sufficiency.*—The law which was in force before the adoption of the Code (Clay's Digest, 307, § 5) required that a bill of exceptions should be "signed and sealed" by the presiding judge; and where the bill purports to have been signed and sealed by him, but without the addition of his seal or scroll, it cannot be regarded as any part of the record.

APPEAL from the Circuit Court of Perry.

Tried before the Hon. EDMUND W. PETTUS.

This action was commenced in October, 1851, and the trial was had at the November term, 1854. The bill of exceptions purports to have been "signed, sealed, and made a part of the record, in term time," and is signed by the presiding judge; but his seal or scroll is not appended to his name. Errors were assigned, and the cause was argued on its merits; but it is unnecessary to notice any of the points made, except the motion to strike the bill of exceptions from the record.

I. W. GARROTT, for the motion, contended, 1st, that the case was governed by the old law, because the action was commenced before the adoption of the Code; 2dly, that the old law required that the bill of exceptions should be sealed by the presiding judge; and, 3dly, that the bill in this case did not conform to the requirements of the law. He cited *Mazange v. Slocum & Henderson*, 23 Ala. 668; *Clay's Digest*, 307, § 5; *Floyd v. Fountain*, 17 Ala. 700; *Kitchen v. Moye*, *ib.* 143; *Haden v. Brown*, 22 *ib.* 572; *Kenan v. Starke & Moore*, 6 *ib.* 773; 2 *Bibb*, 14; 1 *Marsh.* 587; *Hall v. Hudson*, 20 Ala. 284; *Hudson v. Hudson*, *ib.* 364; 4 *Phil. Ev. (C. & H.'s Notes)* p. 813.

J. R. JOHN, *contra*, insisted, 1st, that the bill of exceptions was governed by the provisions of the Code (§§ 1315, 2333), which do not require the seal of the presiding judge; 2dly, that the bill was sufficiently sealed under the old law; and, 3dly, that if it was defective, the appellant should be allowed to establish it.

GOLDTHWAITE, C. J.—The action in this case was commenced before the Code went into effect, and the proceedings had in the cause in the primary court must be governed by the old law.—Code, § 12.

The taking of a bill of exceptions, being but another mode of spreading upon the record the decision of the court upon contested questions of law, is as much a proceeding in the cause, within the meaning of the 12th section of the Code, as a motion in arrest of judgment, or decision upon a demurrer; and the bill of exceptions, in causes commenced before the Code, must conform to the old law.

The law before the Code required that the bill should be

signed and sealed by the judge. Here he has signed, but has not sealed it. We cannot, therefore, regard it as any part of the record in the cause.—Clay's Dig. 307, § 5; 17 Ala. Rep. 700. The statute is imperative, and we cannot dispense with its requirements.

Let the judgment be affirmed.

RUSSELL vs. LITTLE.

[BILL IN EQUITY TO RECOVER MONEY PAID THROUGH FRAUD AND MISTAKE.]

1. *Jurisdiction of equity, in cases of fraud and mistake, where remedy at law is adequate and complete.*—Equity will not entertain jurisdiction of a bill, the sole object of which is to recover money alleged to have been paid through ignorance or mistake of fact on the part of the complainant, and through fraudulent pretences on the part of the defendant, where the remedy at law is adequate and complete.

APPEAL from the Chancery Court of Sumter.

Heard before the Hon. WADE KEYES.

This bill was filed by Gray Little, the appellee, against David M. Russell; and its material allegations were, substantially, as follows: That on the 7th April, 1848, complainant purchased certain lands from one Blake Little, at the price of \$10,000 to him in hand paid, and received from him a conveyance in fee for the same; that at the time of this purchase, and thence until after the happening of the matters herein-after mentioned; complainant was wholly ignorant that there were any real or pretended liens on said lands; that said Blake Little was at that time greatly embarrassed with debts, and complainant was his surety for large sums, whereby he became a loser to a large amount; that said Blake, shortly after said sale, disposed of all his property in payment of his debts, and removed to parts unknown; that after complainant had paid the purchase money of said land, and after the departure of said Blake Little, said Russell caused executions to be issued on two judgments which he had obtained against

said Blake in 1842, and, "falsely pretending that said judgments were unpaid, and not even allowing or mentioning any credits on them," caused said executions to be levied on said lands; that said lands were sold by the sheriff under said executions, and were bid off by one Barnes, who had become a party to the executions by going on a forthcoming bond, for the sum of \$3,000; that complainant attended the sheriff's sale, and, through caution, forbid the sale; that Barnes consented that complainant might redeem and take the lands; that said Russell, who received the \$3,000 bid at the sheriff's sale, pretending to sympathize with complainant on account of his losses by Blake Little, agreed to (and did) assume the debt which Barnes had contracted to raise the money, and to take complainant's bill for the amount; that Barnes accordingly conveyed the lands to complainant, and complainant executed his bill of exchange, payable at the Bank of Mobile; that this bill (except as to \$500 paid before maturity) was extended at maturity, and another executed in lieu of it, which latter bill Russell passed, before maturity, to a purchaser for full value, and it is now outstanding against complainant; and that by these means "said Russell has received from complainant \$3,000, by reason of his asserted lien on said lands, which sum complainant paid to disencumber his estate, believing, by reason of said Russell's acts and representations, that said judgments were unsatisfied liens thereon."

The bill further alleges that, after the occurrence of the aforesaid transactions, he discovered that said Blake Little was residing in Arkansas, and ascertained from him that Russell's said pretences about the lien of said judgments were false, and that said judgments had been paid long before the sale of said lands by said Blake to complainant; that complainant, after receiving this information from said Blake Little, called on Russell, and stated the facts to him; that Russell did not deny the receipt of the payments made by said Blake Little, but pretended that they had been applied to the satisfaction of other debts owing to him by said Blake, to which they were properly applicable; and complainant insists that said payments ought to have been applied in satisfaction and discharge of said judgments. The prayer of the bill is, "that an account may be taken of the amount (if any)

due on said judgments, and of the amount paid by complainant as aforesaid, and of all interest and damages to which he has been put by reason of his having wrongfully to assume and give said bills; that said Russell may be decreed to refund to complainant such sums as he has wrongfully taken, or made him liable for, by asserting the pretended non-payment and lien of said judgments"; and for general relief.

A demurrer for want of equity was interposed to the bill, but was overruled by the chancellor, who, on final hearing, rendered a decree for the complainant; and his decree is now assigned for error.

TURNER REAVIS, for the appellant, argued that the demurrer to the bill for want of equity should have been sustained, because (among other reasons) the remedy at law was full, adequate, and complete; citing, to this point, the following cases: Jones v. Watkins, 1 Stew. 81; Watts & Garraty v. Hunn, 4 Littell, 267; Herring v. McEldery, 5 Porter, 161; Souza v. Belcher, 3 Edw. Ch. 117.

THOS. H. HERNDON and R. H. SMITH, *contra*, contended that the bill was not for damages, in the proper sense of that term, but for the recovery of a specific sum which had been wrongfully and fraudulently obtained; and that it was maintainable on the two-fold ground of fraud on the part of the defendant, and ignorance and mistake of fact on the part of the complainant. They cited Perry v. Armistead, 2 Keen, 222; Green v. Barrett, 1 Sim. 45; Troup v. Wood, 4 Johns. Ch. 229; Reigal v. Wood, 1 *ib.* 402; Willard's Equity, 160; 1 Story's Equity, (4th ed.) § 143 a; Bingham v. Bingham, 1 Vesey, sr., 126; 4 Bibb, 343; Wilkins v. Woodfin, 5 Munf. 183; Littell's Select Cases, 404; 15 Ala. 159; 24 *ib.* 240; Select Cases by Parsons, 220; 3 Peters, 215; 11 Conn. 112; 1 Paige, 90; 4 Dess. 481; 1 Vesey, jr., 424; 2 Stew. 420.

RICE, J.—The bill shows that the defendant, by falsely and fraudulently pretending that his judgments, at and before the sale of the complainant's land by the sheriff under them, "were unsatisfied liens thereon," deceived the complainant, and obtained from him five hundred dollars in cash, and a

bill of exchange which the defendant passed off, before its maturity, for full value, to a *bona fide* purchaser without notice, who is not a party to this suit; that at the commencement of this suit, neither the judgments nor the sheriff's deed formed a cloud upon the title of the complainant to the land; that the only writing between these parties, which was then outstanding and of force, was the aforesaid bill of exchange, which was still held by said *bona fide* purchaser; that there is no deficiency of legal proof of the facts alleged, no necessity for any discovery from the defendant, and no obstacle to a complete remedy at law; that the only object of this suit is to obtain a decree, by which the defendant will be compelled to restore to the complainant the five hundred dollars, and the amount of the outstanding bill of exchange, which complainant alleges were obtained from him by the false pretences and fraudulent conduct of the defendant; and that, if such relief can be given, it is the only relief which can be decreed in the present suit.

To make such a decree, is, in substance, but to decree that the defendant must make compensation in damages for the loss occasioned by his fraudulent acts and representations. We say nothing against the jurisdiction of a court of equity to decree compensation, or damages, for losses occasioned by fraud, where it is done "only as incidental to other relief sought by the bill and granted by the court; or where there is no adequate remedy at law; or where some peculiar equity intervenes."—2 Story's Eq. Jur., § 794; *Woodman v. Freeman*, 25 Maine Rep. 531. But a court of equity will not entertain jurisdiction of a suit for damages arising out of a fraud, when these constitute the sole object of the bill, and there is a perfect remedy therefor at law; nor for money paid by mistake, or obtained by false and fraudulent pretences, when the recovery of such money is the sole object of the bill, and the remedy at law therefor is unobstructed and complete.—*Knotts v. Tarver*, 8 Ala. Rep. 743; *Woodman v. Freeman*, 25 Maine Rep. 531, and the numerous authorities therein cited; *Newham v. May*, 13 Price, 749-753; *Clifford v. Brooke*, 13 Ves. 131; *Pascoe v. Pascoe*, 2 Cox, 109; *Jenkins v. Parkinson*, 2 Myl. & Keen, 5; *Sainsbury v. Jones*, 2 Beavan, 464; 5 Myl. & Cr. 4; *Russell v. Clark*, 7 Cranch, 69.

Doe, ex dem. Saltonstall and wife, v. Riley and Dawson.

If the complainant is entitled, upon the facts stated in his bill, to recover in any court, his remedy at law is complete. *Abercrombie v. Knox*, 11 Ala. Rep. 997; *Br. Bank at Montgomery v. Parrish*, 20 *ib.* 433; *Brown v. Williams*, 4 Wend. R. 360; *Wisner v. Bulkley*, 15 Wend. R. 322; *Handley v. Call*, 30 Maine R. 9; *Pool v. Allen*, 7 Iredell's Law Rep. 121; *McQueen v. State Bank*, 2 Carter's Rep. 413; *Mitchell v. Walker*, 8 Iredell's Law Rep. 243; *McGoffin v. Muldrow*, 12 Missouri R. 512; *Baltimore & Susq. R. R. Co. v. Faunce*, 6 Gill's Rep. 68; *Northrop v. Graves*, 19 Conn. Rep. 548; *Morgan v. Smith*, 7 Ala. Rep. 185; *Munroe v. Pritchett*, 16 Ala. Rep. 785; *Rutherford & Melvor*, 21 *ib.* 750.

The bill does not state a case of which a court of equity can entertain jurisdiction; and for this reason the demurrer to it should have been sustained. The decree of the chancellor is reversed, and the bill dismissed, at the costs of the appellee.

DOE, EX DEM. SALTONSTALL AND WIFE, vs. RILEY
AND DAWSON.

[EJECTMENT BY HEIR-AT-LAW AGAINST CLAIMANT UNDER PURCHASER AT SALE
MADE BY ORDER OF ORPHANS' COURT.]

1. *Jurisdiction of orphans' court to order sale of land for payment of debts.*—The jurisdiction of the orphans' court to order a sale of an intestate's real estate for the payment of debts, under the act of 1822 (Aikin's Digest, 180, § 16), affirmatively appears, in a collateral proceeding, when the record shows a petition by the administrator, alleging a deficiency of personal assets for the payment of debts, and asking an order to sell the real estate, and that the court acted on the petition and granted the order of sale.
2. *Conclusiveness of proceedings had under such order of sale.*—Where the record affirmatively shows that the court had jurisdiction to order the sale, that the land was sold by commissioners under its order, that the sale was approved by the court, and that a deed was executed to the purchaser under its mandate, the action of the court, being in the nature of a proceeding *in rem*, is conclusive until vacated, and cannot, though abounding with errors and irregularities, be collaterally impeached.

3. *When recitals in decrees of orphans' court may be looked to.*—Although recitals in the decrees of courts of limited jurisdiction cannot give jurisdiction; yet, where the jurisdiction otherwise appears, the decree may be looked to for the purpose of ascertaining whether the action of the court, in ordering a sale of lands, was predicated upon the two petitions separately shown in the record, or whether, as might have been done, one was regarded as amendatory of the other, and the two considered as but one application.
4. *Death of sheriff, and ex officio administrator, how proved.*—Where the validity of a sale of land, made under an order of the orphan's court on the application of an administrator *de bonis non*, is collaterally impeached, parol evidence is admissible to prove the death of the sheriff who, *ex officio*, was the previous administrator, as a jurisdictional fact upon which the court acted in appointing the succeeding administrator. But the sheriff being the executive officer of the orphans' court, that court must be presumed to have known when his term of office expired, whether by limitation or death, and to have acted on its judicial knowledge. The admission of parol evidence, therefore, even if erroneous, could have worked no injury.
5. *Irregularities insufficient to invalidate sale.*—The failure to give the statutory notice by citation to the heirs, and the absence of proof by the record that the guardian *ad hitem* of the minor heirs accepted the appointment, or that he filed an answer denying the allegations of the petition, or that the commissioners gave proper notice of the time and place of sale,—are mere irregularities, which might furnish good grounds of reversal on error, but which cannot invalidate the sale, when collaterally attacked, if the record affirmatively shows that the court had jurisdiction.
6. *Deed, when admissible evidence—General objection to evidence.*—A deed of conveyance, executed by the commissioners, under an order of the orphans' court, to the purchaser at their sale, is admissible evidence for a remote purchaser from him, when sued by the intestate's heir-at-law; and though the description contained in it does not correspond with the description of the land sued for, yet, if it embraces any portion of the land sold, a general objection to it may be overruled.
7. *Indefiniteness of description of land—Admissibility of parol evidence to identify it.*—Indefiniteness and discrepancies in the description of the land, in the petition, order of sale, report of sale and commissioners' deed, will not invalidate the sale, when enough appears to show that the land sold and conveyed by the commissioners was comprehended in the description contained in the petition and order of sale; and when this is the case, parol evidence is admissible to fix the boundaries of the portion sold, according to the data furnished by the deed, so as to identify the land therein described.
8. *Boundaries of land how determined.*—Streets which are well defined and designated by some natural or artificial monument, must govern course and distance in fixing the boundaries of lands; but streets which, in the infancy of a city or town, are only undefined portions of land dedicated to public use, themselves requiring to be located, would furnish very uncertain guides in arriving at the boundaries of other lands.
9. *Error without injury.*—When all the evidence is set out in the bill of exceptions, and shows that the plaintiff was not entitled to recover, the appellate court will not reverse in his favor on account of erroneous charges or refusals to charge.

Doe, ex dem. Saltonstall and wife, v. Riley and Dawson.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

EJECTMENT by Seneca Saltonstall and Louisa, his wife, against James Riley and Wm. A. Dawson, for the recovery of certain lots in the city of Mobile, which are described in the declaration as, "All the south-east section of square No. 27, as marked on the plot of survey, beginning at the north-west intersection of Franklin and Dauphin streets, thence running along the north side of said Dauphin street 220 feet to the north-east intersection of Dauphin and Hamilton streets, and extending back northwardly 160 feet, and bounded on the east by Franklin street, on the south by Dauphin street, on the west by Hamilton street, and on the north by lands now or lately of Joshua Kennedy." The situation of the land is more particularly shown in the annexed diagram:



Doe, ex dem. Saltonstall and wife, v. Riley and Dawson.

The defendants entered into the usual consent rule, and pleaded not guilty; Riley admitting himself to be in possession of "that portion of the premises sued for lying on the north-east corner of Dauphin and Hamilton streets, having a front on north side of Dauphin street of — feet, and running back 160 feet, and bounded on the east by the lot in the possession of said Wm. A. Dawson; and Dawson admitting his possession of "that portion of the premises sued for lying at the north-west corner of Franklin and Dauphin streets, having a front of 116 feet on the north side of Dauphin street, and running back 160 feet."

The bill of exceptions, sealed on the trial, is as follows :

"The plaintiffs claimed title to the lands sued for as heirs-at-law of Alvan Robeshaw, deceased. It was admitted by the defendants that Mrs. Saltonstall, one of the lessors of the plaintiff, is the only heir-at-law of her father, said Alvan Robeshaw, deceased, and of her brother, who died a minor and childless; that said Alvan Robeshaw died in 1819 or 1820, and was at the time of his death in the seizin and possession of the lands now sued for; that his said son (and only other child) died a few years afterwards, without children; that said Louisa did not attain her majority until July, 1834; and that said Seneca Saltonstall is now, and was at the time the suit was brought, her lawful husband. It was admitted by both parties that the land sued for is in the city of Mobile, and is bounded on the east by Franklin street, on the south by Dauphin street, and on the west by Hamilton street, and that it consisted of six lots; that Claiborne street is now, and was in 1824, the street next east of Franklin street, that there were six lots of land intervening between Claiborne and Franklin streets, and that Claiborne was the most eastern street, and nearest the heart of the city; that the annual rent of the lots sued for, for six years last past, was \$75 each; and that the value of the improvements claimed by the defendants was \$12,000.

"The defendants claimed title to the premises under a sale made by the county or orphans' court of Mobile in 1824; and, to sustain their title, produced a certified transcript of the entire record of the proceedings in said court in relation to the administration of said Alvan Robeshaw's estate";

Doe, ex dem. Saltonstall and wife, v. Riley and Dawson.

which transcript is made a part of the bill of exceptions, and shows the following facts:

The first entry, dated February 3, 1820, is the grant of letters of administration to Mrs. Catherine Robeshaw, and the appointment of three appraisers. On the 9th March, 1820, as the next entry shows, the sureties on the official bond of the administratrix were changed. On the 5th June, 1820, an order of sale of the personal estate was granted to the administratrix, "she producing an inventory and appraisalment before the day of sale"; and an inventory and appraisalment, together with an account of sales, next appear in the record. On the fourth Monday in February, 1822, Mrs. Robeshaw filed her resignation as administratrix; and letters of administration were thereupon granted to Daniel Duval, then sheriff of Mobile county. In July, 1824, letters of administration were granted to Robert Carr Lane, and the court accepted his bond on the same day.

Two petitions next appear in the record, each signed by the administrator, and one marked, "Filed July 21, 1824"; alleging that the personal estate of said Robeshaw is insufficient to pay his debts, and therefore praying an order to sell certain lots, which are thus described: in one, "three lots of ground, lying on Dauphin street, and bounded south by Dauphin street; *east by Franklin street*, north by the lands of John Moore and Samuel Farnsworth, and west by those of Robert Carr Lane and Hamilton street"; and in the other, "three lots of ground, lying in the city of Mobile, bounded by Dauphin street on the south, *on the east by Claiborne street*, north by the lands of John Moore and Thomas Richardson, jr., and west by the lands of Robert Carr Lane; also, all the right, title, interest and claim which said *Abram* Robeshaw had in or to three other lots adjoining the above on the west, and claimed by Robert Carr Lane." Each of these petitions states there are two minor heirs, whose names and ages are given, that Catherine Robeshaw has been appointed their guardian, and that they all reside in Mobile county.

The next entry, dated July, 1824, is an order that citation issue to the heirs of said Robeshaw, to appear on the third Saturday in August next thereafter, and answer the petition of said administrator for the sale of real estate; and that

Doe, ex dem. Saltonstall and wife, v. Riley and Dawson.

Lewis Judson be appointed guardian *ad litem* of the minor heirs. On the 18th September, 1824, citations were ordered to issue to said Judson, and to the minor heirs themselves, to appear on the third Saturday in October next and answer the administrator's petition for the sale of the real estate; and these citations were issued on 22d September, and executed on the 15th October, the day appointed for the hearing of the petition. On the 24th August, 1824, letters of guardianship over the persons and property of the two minor heirs were granted to Mrs. Catherine Robeshaw. On the hearing of the administrator's petition, on the third Saturday in October, 1824, "satisfactory evidence being adduced to show that the prayer of the petition ought to be granted," the court granted an order of sale "of the following described property, as set forth and specified in said petition—to-wit, three lots of ground, lying in the city of Mobile, and bounded south by Dauphin street, east by *Claiborne street*, north by the lands of John Moore and Samuel (Farnsworth), and west by three lots possessed by Robert Carr Lane; also, the three lots adjoining the above on the west, and bounded south by Dauphin street, west by Hamilton street, and north by the lands of George Getz and said Farnsworth; each lot being 55 feet front, and running back 110 feet." The order appointed Joseph Krebs and Diego McVoy as commissioners to make the sale, directed them to give thirty days notice of the sale in some newspaper published in Mobile, and to make report of their proceedings to the court on the third Saturday of December then next.

The commissioners reported on the 21st December, 1824, that they had sold the lands, "on the premises," on the 19th November, after having given thirty days notice of the time and place of sale by advertisement in the "Mobile Commercial Register", and that James P. Bates became the purchaser "of the three lots bounded south by Dauphin street, west by Hamilton street, north by the lands of George Getz and Samuel Farnsworth, and east by other three lots of said *Abram Robeshaw*; and also of the other three lots adjoining the above on the east, and bounded south by Dauphin street, east by *Claiborne street*, west by the aforementioned three lots, and north by the lands of said Farnsworth and Moore."

Doe, ex dem. Saltonstall and wife, v. Riley and Dawson.

This report, as the minute entry shows, "was approved and ordered to be recorded, which is accordingly done; and it appearing to the satisfaction of the court that the terms of sale have been complied with by said James P. Bates, it is ordered, adjudged, and decreed by the court, that said commissioners convey to said Bates all the right, title and interest which was in said Robeshaw, in and to the above-described premises."

The defendants then offered in evidence the deed made by said commissioners, under the order of the court, to said Bates, in which the land is described as "all that tract of land (or three lots) situate in the city of Mobile, and bounded as follows: west by Hamilton street, south by Dauphin street, east by three other lots belonging to the estate of said A. Robeshaw, deceased, and north by the lands of George Getz and Samuel Farnsworth, containing 110 feet front on Dauphin street, and running back 165 feet; also, another tract of land (or three lots), adjoining the above last-mentioned lots on the east, containing 110 feet front on Dauphin street, and running back 165 feet, and bounded west by the three lots above described, south by Dauphin street, east by Franklin street, and north by the lands of John Moore and Samuel Farnsworth." The plaintiffs objected to the introduction of this deed as evidence, "because it was a deed of different property than that described in the order of sale, in the report of the commissioners to the court, and in the confirmation of the sale by the court." The court overruled the objection, and the plaintiffs excepted.

"The defendants also offered to prove by Joseph Krebs, one of the said commissioners, that the sale of the lots made by them under the order of the court, was made upon the lots sued for in this action, as the premises intended to be sold. To this evidence, so far as it was intended to vary the effect of the said proceedings and sale as contained in the transcript, and to identify the lots sued for as the lots to which the purchaser at said sale thereby acquired title, the plaintiffs objected, on the ground that it was parol evidence, and therefore inadmissible; but the court overruled the objection, and the plaintiffs thereupon excepted."

"The defendants also offered to prove by a witness that

Doe, ex dem. Saltonstall and wife, v. Riley and Dawson.

Daniel Duval, former sheriff of Mobile county, whose name is mentioned in said transcript, died in May, 1824. The plaintiffs objected to the admission of this parol testimony, and insisted that his death, or the vacancy of the office of administrator of said Robeshaw's estate by any other means, should appear by the record of said orphans' court, or the loss of the record be shown; but the court overruled the objection, and plaintiffs thereupon excepted."

"The plaintiffs admitted that the defendants had possession, and that they held a regular chain of title from the purchaser at said sale. There was testimony, also, tending to show that the land sued for was contained in the boundaries described in one of the petitions, in the order of sale, and in the report of the commissioners. The plaintiffs then read to the jury, without objection by the defendants, the notice of said sale given by said commissioners, published in the 'Commercial Register,' a newspaper published in the city of Mobile." This notice, which is made a part of the bill of exceptions, was first published on the 19th October, 1824, and described the land as follows: Three lots of ground, lying in the city of Mobile, bounded south by Dauphin street, east by Claiborne street, north by the lands of John Moore; also, all the right, title and interest of A. Robertson, deceased, to three other lots, adjoining the above, and bounded west by Hamilton street, south by Dauphin street, north by the lands of George Getz, and east by the aforementioned three lots, each containing 55 feet front, and running back 110 feet." In the second publication of the notice, which was on the 26th October, the name was corrected.

"This was all the evidence in the cause; and upon this evidence the court charged the jury, among other things, as follows:

"1. That the proceedings of the orphans' court were irregular, and some of them erroneous, so as to authorize a reversal in an appellate court; still these irregularities were not such as to render the proceedings void, and, consequently, not such as to avail the plaintiffs in this suit.

"2. That, so far as this case was concerned, all that was necessary to be seen was that the record showed that the orphans' court had jurisdiction of the cause, had taken juris-

Doe, ex dem. Saltonstall and wife, v. Riley and Dawson.

diction and directed a sale, and had affirmed the action of the commissioners; and that if these things appeared by the transcript of the record in evidence, and the land claimed by the defendants was within the boundaries of the land described in the order of sale and the report of the commissioners, and was a portion thereof, and had been conveyed by the commissioners with the approval of the court, then the title of the heirs had been divested, and they must find for the defendants.

"3. That the orphans' court had jurisdiction to make the order of sale, and its decree therein was valid, and could not be impeached in this action.

"4. That if they believed that the property sued for was described in either of the petitions, and that it was the premises which were actually sold and described in the commissioners' deed to Bates, they must find for the defendants.

"5. That they might look to said deed, and to the testimony of Krebs, to determine what land was purchased by Bates.

"The plaintiffs excepted to each one of these charges as erroneous, and to the 4th, also, because it referred the construction of the record to the jury; and they then asked the court to give the following charges:

"1. That if the jury believe from the record evidence that Duval, as sheriff of Mobile county, had been appointed by an order of the orphans' court administrator on the estate of said Alvan Robeshaw, deceased, then, unless it appears from the record of the proceedings of said court that said Duval resigned said administration, or that his term of office had expired, or that he had died or had been removed, before the appointment of said Lane as administrator, the appointment of the latter was unauthorized, and all the proceedings of said court in reference to the sale of the real estate of said Robeshaw were void, and the sale did not divest the title out of the heirs of said Robeshaw.

"2. It having been admitted by the defendants that Louisa Saltonstall is the daughter and sole heir-at-law of said Alvan Robeshaw, and that she was a minor under the age of twenty-one years at the time of the filing of said Lane's petitions, and at the time of the sale, then, unless it is shown by the

Doe, ex dem. Saltonstall and wife, v. Riley and Dawson.

record that citation was issued to her at least forty days before the time fixed for hearing said petition, the action of the court upon said petition was unauthorized and void, and passed no title to the purchaser.

3. "If the jury believe from the evidence that, after the filing of the petition by the administrator, the court appointed Judson guardian *ad litem* of the minor heirs of said Robeshaw, and directed citation to issue to him; yet the court was not authorized to proceed to order the sale, unless it has been shown that said Judson accepted the guardianship, or acted as such guardian;

"4. It was the duty of the guardian to have denied the allegations of the petition; and if the court acted in the premises, and ordered the land to be sold, without such denial being made, then the sale was void, and passed no title as against the heirs of said Robeshaw.

5. "The county court had no power to make the order of sale, without proof taken by deposition showing the necessity of the sale; and unless it has been shown that proof was taken by deposition, the order of sale and the sale were void, and no title passed to the purchaser as against the heirs of said Robeshaw.

"6. Unless it has been shown in evidence that, before the sale of the land, forty days notice of the time and place of sale was given, by putting up advertisements at three or more public places in the county, and by publishing notice of the sale in some public newspaper in the State, for three successive weeks before the day of sale, then said sale was void as against the heirs of said Robeshaw and those claiming under them.

"7. Unless the land was so particularly described in the petition on which the court acted that it could be located and identified without oral proof, the court had no jurisdiction, and the sale did not divest the title out of the heirs of said Robeshaw.

"8. That the commissioners appointed by the court had no authority to sell any other land than that described in the decree of the court ordering the sale; and unless it appears by the decree of the court that the lands sued for in this action are the lands described in said decree, then the title of Robe-

Doe, ex dem. Saltonstall and wife, v. Riley and Dawson.

shaw's heirs to the land sued for was not divested by the sale, and the plaintiffs must recover.

"9. It having been admitted by the parties that Claiborne street is east of Franklin street, and that Hamilton street is west of Franklin, and that there were six lots intervening between Claiborne and Franklin streets, and six lots between Franklin and Hamilton streets, and that Robeshaw's lots were bounded on the east by Franklin street,—then, if it appear that, by the decree of said court, a sale was ordered of lots described as being bounded east by Claiborne street, that sale did not divest the title out of the heirs of Robeshaw to the land sued for in this action, and plaintiffs must recover.

"10. No title could pass by the sale without a confirmation of the sale by the court, and the confirmation must be based upon the report of the commissioners; and unless that report, as contained in the said transcript, shows that the property here sued for was the property described in the report, the plaintiffs must recover.

"11. If the court acted upon the petition of the administrator contained in the record, and endorsed 'Filed July 21, 1824,' and that petition called for the sale of only three lots on the corner of Dauphin and Franklin streets, then the court had no power to order the sale of any other lots, nor had the commissioners the right to sell the three other lots on the west of those described in the petition, and to these three no title passed by the sale, and the plaintiffs are entitled to recover them.

"12. If the petition upon which the court acted described the lots as cornering on Claiborne and Dauphin streets, then that must be the starting-point for ascertaining the lots which the commissioners were authorized to sell; and if they sold the three lots cornering on Franklin and Dauphin streets, the sale of the latter was void, and passed no title to the purchaser.

"13. If the jury believe the evidence, they must find in favor of the plaintiffs, for the three lots on Dauphin street immediately west of Franklin, and on the corner of Dauphin and Franklin."

The court refused each one of these charges, except the 8th, "which was given with the qualifications contained in

Doe, ex dem. Saltonstall and wife, v. Riley and Dawson.

its previous charges; and to each refusal, as well as to the qualification given, the plaintiffs excepted."

The errors now assigned embrace the rulings of the court on the evidence, the charges given, and the refusals to give the charges asked.

P. WALKER and A. R. MANNING, for appellants:

As preliminary to an examination of the points presented by the record, we lay down the following general propositions: 1.—That the orphans' court is a creature of the statute; that its duties are defined, and its powers declared, by the law of its creation. 2.—That the power given to that court to order a sale of real estate belonging to an intestate, is in the nature of a special power, and, like all special powers, must be strictly pursued; and that this must be shown by the record.—1 Sm. & Mar. Ch. 561; 6 Wheat. 119; 2 Peters, 492; 10 *ib.* 161; 4 Wend. 436; 7 Mass. 488; 3 Barb. 341; 1 How. (Miss.) 558; 14 Ala. 347. 3.—That the record must affirmatively show that every thing necessary to give the court jurisdiction was performed, or the sale will be void.—6 Ala. 112; 6 Port. 244; 6 Sm. & Mar. 259; 7 *ib.* 449. 4.—That no recitals in the record can give the court jurisdiction. 15 Wend. 449; 7 Cowen, 89; 7 Sm. & Mar. 449. 5.—That jurisdiction cannot be presumed.—3 Barb. 341; 12 Ohio, 253; 1 Blackf. 182. 6.—That when claim of title is founded on an administrator's deed, it must be shown not only that a license to sell was given, but that all the requisitions of the statute were complied with.—4 Geo. Rep. 148. 7.—That the statutory requirements, when to be performed before the sale, must be complied with.—6 Port. 245; 16 Ala. 233; 7 *ib.* 268–73. 8.—That the want of jurisdiction may always be set up against a judgment.—2 Comstock, 459; 15 Johns. 141; 19 *ib.* 33; 2 McLean, 479; 1 Dev. Law R. 259; 11 How. 437; 9 Cowen, 229; 11 Wend. 652.

1. Duval, as sheriff, was appointed administrator; and the record does not show that he ever resigned, or died, or that his letters were revoked before Lane was appointed. It will be intended that the transcript is complete and embraces all the entries, orders, &c.—9 Ala. 794: The appointment of Lane, under the circumstances, was a nullity.—1 Cushm.

Doe, ex dem. Saltonstall and wife, v. Riley and Dawson.

(Miss.) 550; 1 How. (Miss.) 440. The renunciation of an executor must be shown by the record, and not by acts *in pais*. 5 English, 169; 1 How. (Miss.) 440.

2. The record does not show that the guardian *ad litem* was actually appointed, or that he accepted the trust, or that he answered for the infant heirs; and the petition shows that Catherine Robeshaw was their real guardian.—6 Ala. 607; 16 *ib.* 693; 2 Comstock, 459; 1 Hill's (N. Y.) R. 130; 3 Barb. 341.

3. The court was not authorized to divide the guardianship of the minors, and to commit their property to one and their persons to another. The appointment of Judson was therefore erroneous.—1 Green's (N. J.) R. 80.

4. The statute (Clay's Digest, 224, § 17) required at least forty days notice to the minors, while only twenty-seven days elapsed from the issue of citation until the hearing. The citation was served on them on the same day the decree was rendered, and on their guardian *ad litem* the day previous. Short notice is no notice at all.—6 Port. 245; 11 Ala. 120; 3 Barb. 341; 7 *ib.* 39-45; 1 How. (Miss.) 444. Since a minor cannot assent to a waiver of notice, no decree can be rendered without the statutory notice.—4 Ala. 248; 7 Sm. & Mar. 459; 1 *ib.* 351; 8 Blackf. 542; 12 Missouri, 63; 7 Barb. 45. Even if this be a judgment *in rem*, it is essential that constructive notice, at least, should appear to have been given, as actual notice must be in a proceeding *in personam*.—20 Vermont, 65; 1 How. (Miss.) 440. The court must have jurisdiction of the persons of the minors, or the sale will be void.—2 Comstock, 459; 12 Ohio, 268-74; 1 Hill's (N. Y.) R. 139.

5. There was no proof by deposition; and the recital in the record, "satisfactory evidence being adduced," &c., is not sufficient.—9 Ala. 793; 16 *ib.* 238; 12 *ib.* 268-73; 4 *ib.* 248; 2 *ib.* 662; 11 Humph. 488; 7 Sm. & Mar. 449.

6. Had the court power to decree a sale to pay debts, without other evidence than the oath of the administrator or creditor that there were debts?—10 Paige, 366; 1 Munf. 489. The legal necessity for the sale must appear in the order of the court directing it.—9 Ala. 290; 12 *ib.* 268; 2 *ib.* 662; 15 *ib.* 768.

7. There was not sufficient notice of the sale.—6 Port. 245; 7 Ala. 864; 16 *ib.* 233. The record must show that legal notice was given.—1 Sm. & Mar. 351; 7 *ib.* 449; 7 Barb. 45; 3 Denio, 249; 20 Wend. 249; 4 Geo. R. 148; 6 Port. 245; 11 Ala. 118–20.

8. The land sued for is not the land described in the petition, in the order of sale, or in the report of the sale. Parol evidence is not admissible to change the description contained in them.—70 En. Com. Law R. 260; 6 N. H. 205; 5 Hill, 272; 5 Ired. Eq. 373; 3 Ala. 623; 14 *ib.* 347; 13 *ib.* 38; 15 *ib.* 768; Phil. Ev. (C. & H. Notes), 571. Streets, being the most durable monuments, must govern description.—9 Iredell, 58.

9. As to the charges given and refused by the court:

The first charge given is erroneous, because, 1st, the record shows that an administrator had been appointed previous to the appointment of Lane, and there is nothing in it showing that the office had been vacated when Lane was appointed; 2dly, it does not appear upon which petition the court acted; 3dly, the notice by law required was not given to the minor children; 4thly, the appointment of Judson as guardian *ad litem* was unauthorized; 5thly, no notice was given to the guardian, as required by law; 6thly, the record does not show that the guardian appeared and answered; 7thly, the commissioners did not give notice of the sale as required by law; 8thly, the notice first published by them described the property as belonging to *A. Robertson*, and the correct notice afterwards given was not published a sufficient time before the sale; 9thly, a portion of the land was described in the notice as being bounded on the east by Claiborne (instead of Franklin) street; 10thly, the order of sale misdescribed the lots; 11thly, the commissioners, as shown by their report, did not conform to the terms of the decree, as to the form of security to be taken by them; and, 12thly, the record does not show any evidence of the necessity for the sale. The same reasons show that the third charge given was erroneous.

The second charge given was erroneous, because it referred the construction of the record to the jury, when it was the duty of the court to determine whether the record showed that the orphans' court had jurisdiction.—3 Ala. 237; 5 Port. 64; 2 Stew. & P. 193; *Spivey v. The State*, 26 Ala. 90.

Doe, ex dem. Saltonstall and wife, v. Riley and Dawson.

The fourth charge was erroneous, because the orphans' court could not act upon two petitions which were inconsistent with each other, and the transcript should have disclosed upon which petition it acted.

The fifth charge was erroneous, because it was improper to refer to oral testimony to ascertain the identity of the land.

That the first charge asked should have been given, see 1 How. (Miss.) 440; 1 Cushm. (Miss.) 550; 5 English, 169.

That the second charge asked should have been given, see 6 Port. 245; 11 Ala. 120; 3 Barb. 341; 7 *ib.* 45.

That the third and fourth charges should have been given, see 6 Ala. 607; 16 *ib.* 693; 3 Barb. 341; 2 Coms. 459.

As to the fifth charge asked, see 10 Paige, 366; 1 Munf. 489; 11 Humph. 488; 9 Ala. 793; 12 *ib.* 268; 15 *ib.* 768; 16 *ib.* 238; 4 *ib.* 248; 2 *ib.* 662.

As to the sixth charge asked, see 6 Port. 245; 7 Ala. 764; 16 *ib.* 233; 20 Wend. 249; 7 Barb. 45; 1 Sm. & Mar. 351; 7 *ib.* 454; 4 Geo. 118.

As to the seventh charge, see 70 E. C. L. R. 260; 6 N. H. 205; 5 Hill, 272; 5 Ired. Eq. 373; 13 Ala. 38; 15 *ib.* 768.

That the eighth charge should have been given, without any qualification, see 4 Ala. 116; 11 *ib.* 535, 1059; 13 *ib.* 222, 537; 16 *ib.* 720.

Each of the other charges asked asserted a correct legal proposition, and was authorized by the evidence; they should, therefore, have been given.

P. HAMILTON and R. H. SMITH, *contra*, contended,—

1. That each of the petitions, which were received and acted on by the court, alleged the existence of the fact necessary to give the court jurisdiction—viz., that the personal estate was not sufficient for the payment of the debts; and the jurisdiction of the court, therefore, fully attached.—*Lightfoot v. Heirs of Lewis*, 1 Ala. 475; *Duval's Heirs v. P. & M. Bank*, 10 *ib.* 636, 652. All reasonable intendments will be made to support that jurisdiction.—6 Porter, 219, 262; 1 Ala. 475, 733; 15 *ib.* 761; 16 *ib.* 652.

2. These jurisdictional facts appearing of record, irregularities and errors in the proceedings will not be regarded in this suit, which is collateral merely.—6 Porter, 219, 262; 1

Doe, ex dem. Saltonstall and wife, v. Riley and Dawson.

Ala. 710, 730; 6 *ib.* 324; 10 *ib.* 652; 2 How. (U. S.) R. 319; 12 *ib.* 385.

3. The transcript from the orphans' court shows all that was necessary for a purchaser to look to—viz., that the case was within the jurisdiction of the court; that the court took actual jurisdiction, and made an order of sale; and that the acts of the commissioners were approved by the court.

4. The main charge given by the court correctly declares the law of the case; and the charges asked by the plaintiffs, which are based upon mere irregularities in the action of the orphans' court, were rightfully refused. The alleged irregularities, except those which refer to the description of the land, raise the question whether the action of the court can be collaterally impeached,—a question which involves the validity of titles to a considerable portion of the lands in this State, and which is settled by the uniform decisions of this court since the case of *Wyman v. Campbell*, 6 Porter, 246, which overruled the doctrine asserted in 2 Stew. 331, and 3 Stew. & P. 355.—*Lightfoot v. Doe d. Lewis*, 1 Ala. 475; *Duval v. McLoskey*, *ib.* 730; same case, 10 *ib.* 652; *Price v. Wilkinson*, 10 *ib.* 172; *Bonner v. Greenlee*, 6 *ib.* 411; *Perkins v. Perkins*, 7 *ib.* 855; *Cox v. Davis*, 17 *ib.* 714. The objections specified in the 2d, 3d, 4th, 5th and 6th charges asked by the plaintiffs, are specifically overruled in these cases. The same principles have been repeatedly affirmed by other tribunals.—2 How. (U. S.) R. 318; 12 *ib.* 385; 2 Peters, 169; 11 Mass. 227; 11 Serg. & R. 427.

5. The other charges asked refer to the description of the land, and seek to establish as a fatal error the substitution, in some of the proceedings, of Claiborne instead of Franklin street as the eastern boundary. In 1824, Mobile was a small village; and its streets, probably, were mere roads, without any well-known names. Claiborne street is now the ninth street from the river. It will be observed that the land sold consisted of two tracts, each containing three lots, which are uniformly described as adjoining each other; the western boundary of the whole always being Hamilton street. The distances given always correspond, and show that the land claimed by the defendants under their purchase is the land that was intended; and the commissioners' deed, with the

Doe, ex dem. Saltonstall and wife, v. Riley and Dawson.

continuous possession under it, clearly establishes the fact. There is no point which must be assumed absolutely as the place of beginning; but, if any point is to have precedence, it must be Hamilton and Dauphin streets, which are mentioned in all the descriptions; and beginning at that point, there is no difficulty in arriving at the result. It is not a case for the application of the rule that natural or permanent monuments control course and distance; it is a question of identity. But, if streets are to govern course and distance, the proceedings authorized a sale of lands from Claiborne to Hamilton street; and the heir cannot complain that a less quantity was conveyed to the purchaser. Besides, the lands claimed by the defendants are confessedly within these limits, and the other portion of the tract may have been conveyed by Bates to some other person.

6. The deed from the commissioners to Bates was part of the defendants' chain of title, and, therefore, properly admitted in evidence.

7. The testimony of Krebs was competent on the question of identity. In questions of boundary parol evidence is admissible.

8. No evidence of the death of Duval was necessary; the order appointing Lane would not be vitiated by the absence of all proof of Duval's death or resignation. Besides, parol evidence was the best proof of the fact.

CHILTON, C. J.—The main points involved in this case have undergone very thorough investigation, and we therefore deem it unnecessary to repeat what has been heretofore said by this court with reference to them. Upon a careful inspection of the record, and after a review of the adjudged cases, most of which have been collated with much ability and research by the respective counsel, we have attained the following conclusions:

1. That the record from the orphans' court of Mobile county affirmatively shows that said court had jurisdiction to make the order for the sale of the land of Alvan Robeshaw, deceased.

2. That having jurisdiction, and its action being in the nature of proceedings *in rem*, and the land having been sold by

the order of the court, the sale approved by it, and a deed of conveyance executed by the commissioners in accordance with its mandate, such proceedings, though they may abound with errors for which an appellate court would reverse, are nevertheless binding and conclusive until they are vacated. They cannot be collaterally called in question.

3. Although two petitions for the sale of the intestate's land appear in the record, the orphans' court might well have regarded one as amendatory of the other, and have treated them both as constituting but one application. And although recitals in the decrees of courts of special, limited powers cannot give jurisdiction; yet, when the jurisdiction otherwise appears, as in this case by the exhibition of the petitions and the action of the court thereon, we may look to the decree, to see whether its action is predicated upon the petitions separately, or as constituting but one application. In this case, the decree, or order of sale, shows that both petitions were acted upon conjunctively; which, we have seen, the court might well do. That the petition may be identified by the entry; see 1 Ala. Rep. 38, and 4 *ib.* 388, which are analogous in principle, the courts in each case exercising a limited, special jurisdiction *quoad* the subject-matter.

4. We think there was no error in admitting proof of the death of Duval, as a jurisdictional fact, upon which the orphans' court acted in the appointment of the subsequent administrator. If it was erroneous, however, we should hold that it was not prejudicial to the appellant, since Duval was invested with the office of administrator, if installed at all, in virtue of his office as sheriff of Mobile county. As sheriff, he was the executive officer of said probate court; and the court must be presumed judicially to have known when his time expired, and when the office was vacated by death. The matter, therefore, which was shown by the objectionable proof, conceding it to be objectionable, being in contemplation of law within the knowledge of the court, it is more consonant with reason and law to presume the court acted upon its own knowledge that the office was vacant by death of the incumbent, or by the expiration of his official term, than that it should attempt to depose one administrator by the appointment of another to the same office without otherwise removing the former.

Doe, ex dem. Saltonstall and wife, v. Riley and Dawson.

5. It follows from what we have said, that the court properly refused the several charges, making the case turn upon certain irregularities alleged to have intervened in the orphans' court proceedings. The alleged want of proper notice of forty days by citation to the heirs; the fact that the record fails to show that the guardian *ad litem* accepted the appointment, and the absence of an answer by him denying the allegations of the petition; the absence of proof of proper notice of the time and place of sale by the commissioners, as well as the action of the court in the appointment of Lane,—are mere irregularities, not affecting the jurisdiction of the court over the subject-matter, and consequently not such as render the sale void. They may furnish good reasons for setting it aside, or for reversing the proceedings in a revising court, but cannot be allowed to vacate it in this collateral proceeding. Were the law otherwise, there would be no security in such sales, and estates would be almost daily sacrificed for want of bidders rash enough to invest their means in such hazardous purchases.—6 Por. Rep. 219; *ib.* 249; *ib.* 262; 1 Ala. Rep. 475-481; *ib.* 730; 6 *ib.* 411-414; 7 *ib.* 855; 10 *ib.* 172-175; *ib.* 722; 17 *ib.* 714; 16 *ib.* 281, and cases there cited.

6. The deed from the commissioners to Bates was properly admitted in evidence, as a link in the defendant's chain of title. If it embraced any portion of the land ordered to be sold, it was, as to that portion, proper; and the objection being general, it was properly overruled.

7. There was not, in our opinion, such indefiniteness of description of the land sold, or such discrepancy between the deed of conveyance, the report of sale, the order to the commissioners, and the petition, as will vacate the proceedings. Although the land is described inartificially, and somewhat differently, in each attempt at the description of it upon the record; still, we think, enough appears to enable the court to see that the land sold and conveyed by the commissioners was comprehended in the description as contained in the application by the administrator for the sale, and in the order of the court awarding or directing such sale. This appearing, it was competent, by parol proof, to fix the boundaries of the tract or portion sold, according

to the data furnished by the deed, so as to identify the land therein described. There was, therefore, no error in admitting the testimony of Krebs. Indeed he proves what the report of the commissioners already set forth.—viz., that the sale was made upon the land.

8. The appellees' counsel contends, that the streets, being the most durable monuments, must govern in the description. This depends on circumstances. If the streets are well defined, and designated by some natural or artificial monument, they would doubtless control; but if, in the infancy of a town or city, they are not defined, and are but portions of land dedicated to public use, as described upon some chart or plan of the town or city, requiring themselves to be located or fixed, they would furnish very uncertain guides in arriving at the boundary of other lands.

But, concede that the streets mentioned in the descriptions given of this land must govern, and that courses and distances must yield to them, as in case of permanent monuments; the appellants are placed in no better condition; for, if the tracts are co-terminous, divided by a line running north and south, it is clear that, beginning on Claiborne street in the east, and running to Hamilton street on the west, bounding the land south by Dauphin street, the land sold is embraced within that boundary. That the commissioners may have left unsold the portion lying between Claiborne and Franklin streets, would not vitiate the sale of the land between Hamilton and Franklin streets. The first petition set out in the record describes the land as extending from Franklin to Hamilton, bounded south by Dauphin, and north by lands of Moore and Farnsworth. This is the land sold and now claimed by plaintiffs. The only confusion in the description here given is in describing the lands as consisting of three lots, and bounding it on the west by the land of Robert Carr Lane as well as Hamilton street. But, if the streets control, then this petition sufficiently describes the land, aided by the parol proof to fix the boundary of the lands of co-terminous proprietors at the north. The second petition, or that immediately following the other in the record, is for the sale of six lots, bounded east by Claiborne, south by Dauphin, west by three lots claimed by R. C. Lane;

Doe, ex dem. Saltonstall and wife, v. Riley and Dawson.

and also these three last lots, which extend west to Hamilton street. The order of sale extends from Claiborne to Hamilton, and is for six lots, three of them being in possession of the administrator, and bounded on the west by Hamilton street. The commissioners' report shows the sale upon the premises, of six lots, commencing at Hamilton street and extending east, being co-terminous. This would bring the eastern boundary to Franklin, which they evidently designate, through mistake, Claiborne. But this can make no difference, since the identity is sufficiently shown by the number of the co-terminous lots. If, however, this means of identifying them must yield to the call for the street, Claiborne, why, then, it conforms to the order in the sale of the whole of the land. That they failed to convey the whole, and conveyed only the six lots between Hamilton and Franklin, leaving to the heirs the other six lots between Franklin and Claiborne, is certainly no valid ground of objection on the part of the heirs. So that, in any aspect in which the apparent discrepancies may be viewed, the description as respects the land actually sold, and that claimed by the defendants, is sufficient to sustain the proceedings. The data are sufficiently furnished to identify the land, and there is no actual want of conformity in the proceedings as to this particular land, whatever may be said as to the six lots east of Franklin street between that and Claiborne.

9. We are satisfied that the court might have well instructed the jury, that under the proof, the whole of which is set out in the bill of exceptions, and about which there was no controversy, the title to the land sued for was in the defendants. Such being the case, it were needless to criticise the several charges; the rule being, that where the record affirmatively shows that the plaintiff is not entitled to recover, the court will not reverse for an erroneous charge; nor, *a fortiori*, for refusing to charge.—See 3 Ala. Rep. 599; 6 *ib.* 631; 8 *ib.* 737; 9 Por. 403. In such case, the plaintiffs have sustained no injury.—See cases collected in Reavis' Digest, p. 319, § 71.

It may be that some of the charges given referred to the jury matters of law, as to the construction to be put upon the orphans' court proceedings; but the jury, by their verdict,

Commissioners of Pilotage, &c., v. Steamboats Cuba, Swan, and J. H. Bell.

found it as the court should have declared it, and so the plaintiffs were not injured.—8 Ala. Rep. 532.

There is no error in the record of which the appellant can complain. Let the judgment be affirmed.

COMMISSIONERS OF PILOTAGE OF MOBILE BAY

vs.

STEAMBOATS CUBA, SWAN, AND J. H. BELL.

[LIBELS AGAINST STEAMBOATS FOR VIOLATION OF REGISTRATION LAW.]

1. *Lighter and tow-boat within statute.*—Under the act of February 15, 1854, (Pamphlet Acts 1853-4, p. 50,) “to provide for the registration of the names of steamboat owners,” which imposes a penalty upon the owners of any steamboat, navigating the waters of this State, for a failure to file in the proper office, “before such boat leave the port of Mobile,” a written statement of the names and residences of her owners; *held*, that a steamboat, used exclusively as a lighter and tow-boat, which plied between the wharves of the city and the lower part of the bay outside the bar, carrying cargoes to and from large vessels which could not pass the bar, was within the statute, although she never went outside the limits of the port of Mobile.
2. *Limitation of suit for penalty against boat.*—The provision of the second section of this act, which gives a remedy against the steamboat by admiralty process, “in the same manner as is provided by the laws of this State for the recovery for work and materials furnished steamboats,” refers only to the form and mode of conducting the proceeding, but does not limit the suit to thirty days after the accrual of the cause of action. The limitation of the suit is one year, as prescribed by section 2481 of the Code.
3. *Constitutional power of Congress to regulate commerce.*—The constitutional power vested in Congress to regulate commerce between the several States, necessarily includes the power to regulate navigation, as one of the means by which commerce is carried on, and, where the navigation extends into the interior, is not arrested by the intervention of State boundaries; but the grant of this power to Congress does not operate as an absolute prohibition on the States to legislate on the subject.
4. *Registration act not regulation of commerce.*—The act of February 15, 1854, “to provide for the registration of the names of steamboat owners,” which requires a written statement of the names and residences of the owners of steamboats navigating the waters of this State to be filed in the probate court of Mobile, and imposes a penalty of \$500 for its violation, is not a

Commissioners of Pilotage, &c., v. Steamboats Cuba, Swan, and J. H. Bell.

regulation of commerce, within the constitutional grant of that power to Congress.

5. *Nor in conflict with license laws of United States.*—The laws of the United States, regulating the coasting trade, do not confer rights, in the proper sense of that term, but rather impose restrictions on the trade; and the additional requisition of this State statute, as it does not obstruct or dispense with any of the requisitions of the acts of Congress, cannot be said to be in conflict with them.
6. *Nor violative of ordinance of 1819, as imposing tax or duty.*—The requisition which this statute makes upon the owners of steamboats, is not a tax, duty, impost, or toll, within the ordinance of 1819, by which Alabama accepted the conditions of the act of Congress admitting her into the Union, and declared "that all navigable waters within this State shall forever remain public highways, free to the citizens of this State and of the United States, without any tax, duty, impost, or toll therefor, imposed by this State."

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

The proceedings in these cases were instituted in the name of the commissioners of pilotage of the bay and harbor of Mobile, on the affidavit of Wm. S. Paine, to recover the penalty of \$500 for an alleged violation of the act, approved February 15, 1854, entitled "An act to provide for the registration of the names of steamboat owners." In the case of the *Swan*, the libel alleged a single violation of the act—to-wit, "that the owners of said steamboat, in violation of said act, did permit the said steamboat to be navigated on the Mobile or Alabama river, a river of this State indifferently known by both of said names, before the first day of March, 1855, without first having filed the certificate or statement as provided for and required by said act; and that said steamboat left the port of Mobile, after the first day of July, 1854, for the purpose of said navigation, and within thirty days last past." In the case of the *Cuba*, the libel alleged three separate violations of the act, as occurring on the 26th and 27th of February, and on the 2d of March, 1855; and in the case of the *J. H. Bell*, six separate violations of the act were alleged—to-wit, on the 16th, 17th, 18th, 19th, 20th, and 21st days of February, 1855. The libel against the *J. H. Bell* was filed on the 1st day of March, and the others on the 5th day of March; and in each case a writ of seizure was

issued, under which the sheriff took possession of the boats.

The owners of each boat intervened, and filed their exceptions and answers to the libels, in substance as follows:

J. H. Bell.—Exception: "That the libel is insufficient in law in this: that the statute of the State of Alabama, for the violation of which said libel is brought against said steamboat, is contrary to the constitution of the United States, and void." Answer: *First.*—That said steamboat is not guilty of a violation of the said law of the State. *Second.*—Admits that said steamboat did pass by the port of Mobile, on the 16th February, 1855, on her trip from the city of New Orleans, in the State of Louisiana, to Montgomery, in Alabama, without her owners having filed the statement required by said statute; but alleges that, on the 17th and 18th days of said month, she was on the Alabama river, running for the city of Montgomery in said State, and that she was not in, and did not leave, the port of Mobile on said last-mentioned days. Denies that said steamboat run or navigated the Mobile or Alabama river, within the meaning of the act aforesaid; and alleges that said boat, on the 16th February aforesaid, ran from the city of New Orleans, in the State of Louisiana, a place out of the State of Alabama, to the city of Montgomery, in said State of Alabama, and that said boat run and navigated upon the high seas and lakes between the States of Louisiana and Alabama, as well as upon the waters or rivers of Alabama. *Third.*—That said steamboat, at the time she was libeled by said commissioners of pilotage, was engaged in the coasting trade between the States of Alabama and Louisiana, was regularly enrolled as a coasting vessel at the custom-house of the United States, pursuant to the act of Congress, and was duly licensed to run in the coasting trade, by the collector of the port of Galveston, for the term of one year; which said license was in full force at the time said libel was issued.

Cuba.—Exception same as above. Answer: *First.*—That the owners of said boat are not guilty of violating said statute mentioned in said libel. *Second.*—Admits that said boat did leave the port of Mobile on the several days specified in said libel, without her owners having filed the statement required by said statute; denies that said boat did, on

said days or at any other time, run or navigate the Alabama or Mobile river, within the meaning of said act; and alleges that said boat, on said specified days and at all other times, did run or navigate the high seas and lakes between the port of New Orleans, in the State of Louisiana, and the port of Mobile, in the State of Alabama. *Third.*—Alleges that said boat, before and at the time she was libeled by said commissioners, was engaged and employed in the service of the United States, in carrying the United States mail from said city of Mobile to said city of New Orleans. *Fourth.*—Alleges that said boat, before and at the time she was libeled by said commissioners, was engaged in the coasting trade between the States of Alabama and Louisiana, was regularly enrolled in the custom-house of the port of New Orleans, and was duly licensed to run in the coasting trade of the United States, by the collector of customs for said port, for the term of one year; which said license was in full force and unexpired at the time said libel was filed.

Swan.—Claim, exceptions, and answer as follows:

“1. That they (the stipulators) are the true and *bona fide* owners of said steamboat, her tackle, apparel, and furniture; and that no other person is the owner thereof.

“2. That they do not know, and cannot answer, whether the said libellants, and each and every one of them, are or are not the commissioners of pilotage of the bay and harbor of Mobile; and they insist that said libellants be required to make due proof that they are such commissioners.

“3. That said libel is not sufficient in law to support the claim of the libellants, in this: that said libel does not allege or show who were the owners of said steamboat; that it does not allege or show the facts necessary to show that the owners of said boat have incurred the forfeiture, or subjected themselves to the penalty, prescribed by the act mentioned in said libel; that said act is contrary to the constitution of the State of Alabama, and to the constitution and laws of the United States of America; that the penalty and forfeiture mentioned in said act is a personal penalty or forfeiture, which may be incurred by the owner or owners of any steamboat who may fail to perform the duties prescribed by said act, and not a forfeiture of said steamboat itself, and cannot

be recovered or enforced by a proceeding in admiralty against such steamboat alone for its condemnation; that said libel is equivocal and uncertain, in stating that said steamboat was run on one or the other of two different rivers in the State of Alabama, to-wit, the Alabama river and the Mobile river, without stating in which of them it was so run, and is uncertain and insufficient in other respects; that said libel does not show any case of which this court, as a court of admiralty, can take cognizance.

"4. That said boat has never left the port of Mobile since the first day of July, A. D. 1854.

"5. That said boat did not leave the port of Mobile within thirty days next preceding the filing of said libel.

"6. That said steamboat is an American vessel, of more than twenty tons burthen, was built in the United States of America, and is and always has been wholly owned and commanded by citizens of the United States of America; that said steamboat, before the passage of the act mentioned in said libel, was duly enrolled and licensed in and at the United States custom-house at Mobile, in conformity with an act of Congress, entitled 'An act for enrolling and licensing ships and vessels to be employed in the coasting trade and fisheries, and for regulating the same,' and has always from that time continued to be, and still is, so enrolled and licensed; that said steamboat, since the first day of July, 1854, has never been used or navigated in or upon any other rivers or waters of the State of Alabama than tide waters navigable from the sea, and constituting part of the coast of the United States of America; and so they say that said steamboat is not, and they as owners of said steamboat are not, liable to any penalty or forfeiture prescribed by said act.

"7. That the port of Mobile, before and at the time of the passage of said act mentioned in said libel, was and is a port of entry of the United States of America, and was and is resorted to and frequented by ships and vessels, of different size and tonnage, engaged in the trade and commerce of the United States with foreign nations and among the several States, for the purposes of such trade and commerce; that ships and vessels of small size and tonnage, so engaged in such trade and commerce, were and are accustomed to come

up to the wharves of the city of Mobile, within the port of Mobile, and where the tide ebbs and flows, for the purpose of discharging or receiving their cargoes in carrying on such trade or commerce; that other ships and vessels, of larger size and tonnage, so engaged in such trade and commerce, and so resorting to and frequenting said port for the purposes aforesaid, cannot come up to the wharves of said city, on account of the shallowness of the water in some parts of the bay of Mobile belonging to said city, and have long been and are now necessarily compelled and accustomed to anchor in the lower parts of said bay, and to discharge and receive their cargoes by the means and use of lighters, employed to carry the cargoes of such ships and vessels from such ships and vessels to the wharves of the city, and from the wharves of said city to such ships and vessels, and it has long been and is necessary and customary that ships and vessels resorting to and frequenting said port should be towed in and out of said port and bay, in entering and leaving said port, by steam tow-boats; that said steamboat *Swan*, so being an American vessel as aforesaid, duly enrolled and licensed, before the passage of said act of the legislature of Alabama, was, and ever since that time has been, and is now, used and employed, wholly and exclusively, as a lighter and steam tow-boat, within the port of Mobile and upon tide waters, and has never, since the first day of July, 1854, been used, run or navigated in any rivers or waters of the State of Alabama above the said port of Mobile."

The case of the *Swan* was submitted to the court, on an agreement that the facts set forth in the libel and answer are true, except in so far as they are modified and controlled by the following statement: "It is agreed by the parties in this case, that the allegations in the claimants' answer are admitted to be true, except the denial that said steamboat has left the port of Mobile within thirty days next preceding the filing of this libel; and that question is to be submitted to the court, as a mixed question of law and fact, reserving to either party the liberty of appealing from the decision of the court, either as to the law, or facts, or both. It is further admitted, on that question, that the said steamboat has been solely employed as a lighter and steam tow-boat, as alleged

Commissioners of Pilotage, &c., v. Steamboats Cuba, Swan, and J. H. Bell.

in the answer; that, in prosecuting said business, said boat has come up to the wharves of the city, from the lower part of the bay, and returned from the wharves to such ships; that, in so doing, said boat has sometimes come up or gone down the channel commonly known as Spanish river, which is a channel by which vessels are accustomed to come up to the wharves of the city; that it is considered and spoken of generally, by the port-wardens and pilots, as part of the port of Mobile, and as coming within their jurisdiction and authority as such, and that it and the whole bay of Mobile is generally considered the port of Mobile; that said vessels, in said navigation, also navigate the Mobile river in front of the city of Mobile; that the Mobile river in front of the city, and the Spanish river, are within the corporate limits, while the lower bay of Mobile is beyond the corporate limits of said city; that said boat, in said navigation, sometimes tows vessels beyond the outer bar of the bay, and into the gulf to the extent of two or three miles, but has not done so within thirty days next preceeding the filing of this libel, but has since July, 1854. It is admitted, also, that there are other vessels than steamboats, to-wit, vessels propelled by sails, of large size and tonnage; which are engaged in the trade and business of lighters as aforesaid, in the same manner with steamboats." The facts of the two other cases, except so far as they appear in the libel and answers, are not stated in the record.

The court dismissed each of the libels; holding, in the cases of the *Cuba* and *J. H. Bell*, that vessels engaged in the coasting trade between New Orleans and Mobile, regularly enrolled and licensed under the acts of Congress, were not within the provisions of the statute. The decree in the case of the *Swan* does not state the reason on which it was founded. These decrees are now assigned for error.

JOHN T. TAYLOR, for the appellants, contended,—

1. That the statute of Alabama, under which these proceedings were instituted, was not a regulation of commerce, but of police, and was therefore passed in the exercise of a power rightfully belonging to the State.—*City of New York v. Miln*, 11 Peters, 102.
2. That, even if the statute fell within the power granted

Commissioners of Pilotage, &c., v. Steamboats Cuba, Swan, and J. H. Bell.

to Congress, still Congress has not the exclusive right to legislate on the matter within the State; and, as the statute does not come in collision with any legislation by Congress, it is not unconstitutional.—*Cooley v. Board of Wardens of Philadelphia*, 11 Howard, 299.

WM. G. JONES, P. HAMILTON, E. S. DARGAN, and B. LABUZAN, *contra*, made the following points :

1. The statute on which these libels are founded, is highly penal, and should be strictly construed. This principle is applicable to statutes passed in restraint of trade and commerce, and imposing penalties or forfeitures.—*Dwarris on Statutes*, 742. If a statute admits of two constructions, by one of which it would be constitutional and valid, while by the other it would be unconstitutional and void, the former construction must be given to it.

2. The State has power to pass laws regulating its purely internal commerce, but it has no power to pass laws regulating or interfering with foreign commerce, or commerce between the different States; the latter power being vested exclusively in Congress.—*Authorities cited below*. This statute, therefore, should be so construed as to limit its application to steamboats engaged exclusively in the purely internal trade, and navigating the interior rivers of the State, and not to extend it to steamboats engaged exclusively in the foreign and coasting trade.

3. But, if the act is to be construed as extending to enrolled and licensed American vessels engaged exclusively in the foreign and coasting trade, then it is insisted that the act, to that extent, is contrary to the constitution of the United States, and consequently void. The varying and conflicting provisions of the laws of the several States under the old "articles of confederation," in relation to commerce and shipping, constituted one of the greatest evils of that system; and to remedy this evil, and to secure uniformity in the laws and regulations on that subject, was one of the principal objects in view in forming the constitution. The constitution (Art. I, § 8) accordingly expressly confers upon Congress "the power to regulate commerce with foreign nations, and among the several States." The power to regulate com-

Commissioners of Pilotage, &c., v. Steamboats Cuba, Swan, and J. H. Bell.

merce includes the power to regulate navigation, which is one of the means by which commerce is carried on; and, if navigation, then also it includes vessels, which are the instruments of navigation.—*Gibbons v. Ogden*, 9 Wheat. 190–93, 229–30; *Brig Wilson*, 1 Brock. 431. This power does not stop at the external boundaries of a State, but continues from the beginning to the end of the navigation.—9 Wheat. 144; *Brown v. State of Maryland*, 12 *ib.* 446; 1 *Kent's Com.* 432; 32 *Maine*, 362–4; 3 *Cowen*, 713.

4. The mere existence of this power in Congress, if it had never been exercised, excludes the right of any State to pass any laws on the subject. Commerce, in its very nature, is a free intercourse; and legislation is only needed to restrain, to regulate it. The legislation of Congress speaks as strongly by its silence, by what it omits, as by what it prescribes.—16 *Peters*, 617–18; 5 Wheat. 1–21; 13 *Howard*, 566; 11 *Peters*, 145; 14 *ib.* 575; 12 Wheat. 419, 445; 7 *Howard*, 434. But, whether this be so or not is of no consequence, Congress having exercised its power from the commencement of the government up to the present time, and thus necessarily excluded all other legislation on the subject. 1 *U. S. Statutes at large*, 55, 287, 305; 9 *ib.* 440; 2 *Peters*, 245; 12 *Howard*, 299; *Sheffield v. Parsons*, 3 *Stew. & P.* 302; *Fontaine & Dent v. Beers & Smith*, 19 *Ala.* 722. There is no question that Congress has undertaken, by legislation, to regulate commerce, as carried on by navigation, with foreign nations, and the coasting trade. Those laws declare what shall be done by the owners of vessels, to enable them to engage in one or the other kind of commerce; and the officers of the customs are directed to issue licenses, which necessarily import authority or permission to do the thing licensed, to such vessels as comply with the regulations. The act of 1854 interferes with the navigation of boats trading on the waters of Alabama. It prescribes a further condition, over and beyond those imposed by the laws of the United States. It operates directly on the vessel, prohibiting it from leaving the port of Mobile until its owner has complied with the new condition. It subjects the vessel itself to seizure and sale to pay the penalty,—the same means that Congress has adopted to enforce obedience to its laws.

5. The act cannot be supported as a police law. It is, by its title and in its provisions, a registration act; and none of its provisions are of the character of police regulations, which embrace only laws for the prevention or punishment of crime, or for the preservation of the health, morals, and peace of the community. Its operation is strikingly different from that of any police law which has been sustained by the supreme court. They operated on the person; this on the boat. They operated at the termination of the voyage; this operates to forbid a voyage from Mobile, or to arrest the vessel in its voyage.—The License cases, 5 Howard, 589–92; The Passenger cases, 7 *ib.* 408, 425, 457; Moore v. Illinois, 14 *ib.* 18.

6. The statute is also violative of the ninth and tenth sections of the first article of the constitution, which declare that “No State shall, without the consent of Congress, lay any duty of tonnage,” “nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.” The term *duties*, as defined by Bouvier (Law Dictionary, vol. 1, p. 349), embraces all impositions or charges levied on persons or things; and the courts have considered the terms very nearly synonymous.—7 Howard, 408, 414; 3 Stew. & P. 304. The amount of the tax is but small, but that does not affect the principle.—12 Wheat. 439; 4 Denio, 475; 3 Stew. & P. 302.

7. The statute is also violative of the ordinance of Alabama, accepting the act of Congress which admitted her into the Union, which declares that all her navigable waters “shall forever remain public highways, free to the citizens of this State and of the United States, without any tax, duty, impost, or toll therefor, imposed by this State.”

8. The act is also contrary to the constitution of Alabama. It violates the first section of the first article, because it applies only to the owners of steamboats leaving the port of Mobile, and does not apply to boats navigating the Tennessee or the Chattahoochie river, or even to boats running on the Alabama or Tombeckbee between points above the port of Mobile. It violates the ninth section of the same article, because it authorizes the seizure of a boat, of the value (it may be) of \$50,000, without any notice to the owner, and though he may be living in Mobile.

9. But, even if all the foregoing propositions should be held erroneous, still the libel against the *Swan* cannot be sustained, because it was not shown that she had left the port of Mobile as alleged. The court below properly held, that no penalty was incurred unless the boat had left the port of Mobile without making the registration prescribed. So far as this was a question of fact, the decision, even if erroneous, is not revisable in this court; and, so far as it is a question of law, the decision is undoubtedly correct. A vessel might lie in the port, or move from point to point within the port, for ten years, and yet incur no penalty under the act *until it left the port* without making the registration. It was indispensably necessary, too, that it should be alleged and proved that the boat had left the port within thirty days next preceding the filing of the libel. The act gives two remedies for the recovery of the penalty: one by suit against the owner, and the other by attachment by admiralty process against the boat, "*in the same manner*" as provided by law for the recovery for work and materials furnished steamboats; that is, by libel filed within thirty days after the right accrued.—Code, § 2706.

GOLDTHWAITE, C. J.—By the statute of 15th February, 1854, the owners of all steamboats, navigating the waters of this State, are required to file in the office of the judge of probate of Mobile county a statement in writing, and on oath, of the name of the boat, its owners, and their place of residence; and upon any change of ownership being made, the transferree is required to file a similar statement, setting forth such change, his place of residence, and the interest transferred. The statement is required to be filed before the boat leaves the port of Mobile, and may be made by agent or attorney.

The second section gives a penalty against the owners of any steamboat, who shall permit the same to be run or navigated upon any of the rivers of the State; which may be recovered either by suit against them, or by "attachment against the boat by admiralty process, in the same manner as is provided by the law of this State for the recovery for work and materials furnished steamboats."

The object of the statute is apparent upon its face. It was designed to give more effectual protection to the persons and the property of citizens, by advancing their remedies for torts or contracts done or made by the agents of steamboats, while navigating the waters of this State. The statute itself makes no exception. A compliance with its requisitions is demanded of the owners of all boats leaving the port of Mobile, and navigating our rivers; and, in view of the objects of the act alone, no good reason is perceived for distinguishing in favor of the owners of boats engaged in navigation which extends beyonds the limits of the State.

In the case of the *Swan*, it has been urged that, to subject the owners to the penalty, it is necessary that the boat should go outside of the limits of the port of Mobile, which includes a portion of the river above and below the city, as well as the upper and lower bay. We cannot, however, give the statute this construction. A port means a "commercial point to which vessels resort", as well as a "collection district", a "harbor", or "shelter." Where the navigation was continuous, and extended through and beyond the limits of the port, we incline to the opinion that, if a vessel in her voyage anchored within the limits of the port, the right to the penalty would not accrue, although she had navigated a portion of the river; but where the navigation was not of that character, but commenced at Mobile, or at any other point in the bay or harbor, it would be a leaving of that port, within the meaning of the act, when she started from her berth at the wharf, or broke anchor, and proceeded on her voyage.

Neither can we agree that the remedy against the boat is barred by the failure to proceed within thirty days after the penalty accrues. The act, in assimilating the remedy to the law for the enforcement of mechanic's liens, refers simply to the form and mode of conducting the proceeding. The limitation is prescribed by the Code, (§ 2481,) which bars all causes of action, for which a special remedy is given by attachment against steamboats, in one year.

The three boats, then, all occupy the same position in law. They have all left the port of Mobile, and all have navigated the rivers of the State; and they are each liable to the penalty

which the law declares against them, unless the constitutional objections which have been urged against the validity of the statute can be sustained.

By the constitution of the United States it is provided, that Congress shall have power to regulate commerce "among the several States;" and it is conceded that this power necessarily includes the right to regulate navigation, as one of the means by which commerce is carried on, and that power is co-terminous with the act to which it applies—that in case of commercial intercourse between two States, where the navigation continues into the interior, the power of Congress in the regulation of the subject is not arrested by the intervention of State boundaries, but in such cases may be exercised up to the point where the act of commerce or navigation terminates.

We do not, however, admit that the mere grant of this power operates as an absolute prohibition on the States to legislate on the same subject; and we are not aware that the affirmative of this proposition has received the sanction of any court. The judges of the supreme court of the United States have expressed different views on this question; but the opinion of the majority of the members of that court in the license cases, (5 How. 504,) and the decision of the court in the more recent case of *Cooley v. The Board of Wardens of Philadelphia*, (12 How. 299,) are directly opposed to such a conclusion.

But, if it was conceded that the power to regulate commerce between the States was vested exclusively in Congress, —is the act in question a regulation of commerce? It interposes no obstruction to navigation. It simply demands of steamboat owners, for the purpose of facilitating legal remedies, that, before their boats leave the commercial port of the State, to navigate its waters, they should register the name of the vessel, and of themselves, with the place of their residence. The penalty for the omission to perform these requisitions acts upon the vehicles of commerce, it is true; and so does every State law which give an attachment, or writ of seizure, or execution against a vessel for a wrong done or contract violated. A law which authorizes a creditor to take the body of a seaman against whom he has a

judgment, when found within the jurisdiction of the State, may, in particular cases, embarrass and retard navigation,—may act upon the means by which commerce is carried on; and yet such laws could not be regarded as regulations of commerce. The failure of a grantee to have his deed recorded, may result in defeating his title and turning him out of the possession of his land; but the law which required the registration of the deed, if it enforced the requisition by the forfeiture of the land, could in no sense be deemed a regulation of agriculture. We think the error is in confounding the remedy which is given for the violation of the law, with the duty which it imposes. If the act, therefore, is not to be regarded as a regulation of commerce, the argument that it is in derogation of the powers of Congress on that subject fails.

But it is urged, that the State law is in conflict with the laws of the United States upon the subject of navigation; and that, in such cases, the law of Congress is declared by the constitution to be the supreme law of the land. But where is the conflict? Both laws can be executed, without in the slightest degree interfering with each other; and it certainly can be no objection to a State law, that it adopts the same or similar means to carry out its powers, which Congress has employed in the exercise of a power belonging to the United States.—Marshall, C. J., in *Gibbons v. Ogden*, 9 Wheat. 204.

But it is said, that the compliance with the laws of the United States, and taking out a coasting license, conferred upon the vessels the right to pursue that navigation for the term specified in the license; and that the State, by adding another requisition to those imposed by Congress, has impaired this right. If the argument be a sound one, and the effect of the license issued under the authority of the law was to confer upon the vessel the absolute and unqualified right to the extent which is claimed by the counsel for the appellees, it would seem to follow that any State legislation, which affected the right, would be an unwarrantable exercise of power; and yet it is not denied that the license does not prevent a quarantine law, passed by a State, from arresting the vessel, while engaged in a navigation of which Congress has the control, and, if need be, consigning both cargo and

Commissioners of Pilotage, &c., v. Steamboats Cuba, Swan, and J. H. Bell.

vessel to destruction. So it has been held, that a State, by a police law, may add a requisition to those imposed by Congress in navigation between the States, when the act operates within the limits of the State.—*Fitch v. Livingston*, 4 Sand. Sup. Ct. Rep. 492. If the statute of this State is to be referred to the police powers, which, in a broad sense, embrace all legislation for the internal regulation and domestic order of the State, (4 Black. Com. 162,) it falls directly within the influence which sustains the laws to which we have just referred. So, also, if these laws are valid, simply because they are regarded as a lawful exercise of a power which the States have never given up, as the same principle would apply equally to the other reserved powers, it would be no objection to laws passed to assert them, that they imposed additional requisitions to those which the laws of the United States imposed upon the same subject. On the other hand, if the validity of State police laws, when affecting commerce, are sustained on the ground that the State powers, in these respects, form an implied exception to the grant to regulate commerce, then the grant itself must be construed as if the exception was expressed, and the State law would be paramount.

We do not, however, consider it necessary to determine these delicate and interesting questions; and have merely referred to them for the purpose of showing that, if the statute in question is to be referred to the police powers of the State, it is valid, in any aspect in which it can be presented.

If it is not properly to be referred to these powers, then the answer to the objection we have stated, is, that the regulations of Congress, in relation to the coasting trade, so far as granting licenses is concerned, were not intended to confer rights, in the proper sense of that term, but were intended to operate as restrictions, preventing vessels from pursuing that navigation at all, unless they complied with the requisitions deemed by Congress essential to the national interests. If the State law dispensed with, or obstructed, the execution of these regulations, a different question would be presented. But, when the two laws are not in collision, and the State law is passed in pursuance of a power which it possesses, we cannot hold it invalid, merely because it adds to a requisition made by Congress in the exercise of a different power.

In relation to the suggestion, that the act is in violation of the ordinance of Congress, accepted by Alabama, which declares "that all navigable waters within the State shall forever remain public highways, free to the citizens of this State and of the United States, without any tax, duty, impost, or toll therefor, imposed by this State," we deem it unnecessary to say more than that we do not regard the requisitions which the act makes upon the owners of boats as either a tax, duty, impost, or toll, for using the rivers of this State as a highway, within the spirit and meaning of this ordinance.

The decree below is reversed, and the cause remanded.

WELLS, EXECUTOR, &C., vs. BRANSFORD.

[APPLICATION FOR PROBATE OF WILL OF MARRIED WOMAN.]

1. *Wife's right to dispose by will of her separate estate.*—Where there is an agreement between husband and wife, before marriage, that she shall have either the whole or a particular part of her personal property to her separate use, she may dispose of it by will, without the consent of her husband.
2. *Ante-nuptial agreement established on secondary evidence.*—In this case, the probate of the wife's will being resisted by the husband, the execution of an ante-nuptial agreement between them was established on the testimony of two witnesses, who had often seen and read it, in connection with evidence of the husband's subsequent declaration that he had burned it; although there was evidence of the wife's declarations, to several persons, that there never was any marriage contract between her and her husband; and although the witnesses who testified to its existence could not recollect the language of it, and did not agree as to its precise terms.
3. *Presumption contra spoliatores.*—A husband, in resisting the probate of his wife's will, can derive no advantage from any obscurity or uncertainty in the secondary evidence adduced of the contents of an ante-nuptial agreement between him and his wife, when the paper produced by him, on notice, is materially different from that to which the witnesses depose, and there is evidence of his declaration that he had burned the marriage contract. The maxim, *omnia presumuntur contra spoliatores*, applies with full force against him.
4. *Party's answers to interrogatories, admissibility of.*—A party's answers to interrogatories, under the statute in aid of discoveries in common-law suits, if his adversary declines to read them, cannot be considered by the court as evidence for him for any purpose.

5. *Remandment of cause on reversal of decree.*—On the reversal of a decreed of the probate court, disallowing the probate of a will, the cause having been heard before the judge without the intervention of a jury, although the appellate court might (Code, § 3034) render the decree which the probate court ought to have rendered, the safer practice is to remand the cause.

APPEAL from the Court of Probate of Madison.

IN THE MATTER of the last will and testament of Mrs. Elizabeth H. Bransford, which was propounded for probate by the appellant, and contested by the appellee, her husband; and which gave certain slaves, eight in number, to Martha W. Pritchett and Elizabeth H. Vanhook, who were the neices of said testatrix. The proponent alleged, in his application for probate, that said testatrix, at the time of her death, was the wife of Abram Bransford, the appellee, but that her will, notwithstanding her coverture, was valid, and ought to be admitted to probate, because, 1st, "her said husband consented and agreed that she might make said will"; 2dly, "she had and held, in the negroes so disposed of by said will, a separate estate, to her sole and separate use"; 3dly, "the marital rights of her said husband never attached to said negroes, because, prior to her marriage with him, she and he executed a written agreement, whereby he relinquished all right to said negroes which he might or could acquire by said marriage, and she reserved to herself a separate and exclusive estate in them; which said deed of marriage settlement is now in the possession of her said husband, unless he has destroyed it, and he is hereby notified to produce it on the hearing hereof"; and, 4thly, "it was distinctly agreed and understood between them, prior to said marriage, that a deed should be executed, on the marriage, securing to her a separate estate in all the property she then possessed,—that such a deed was actually written out and prepared, and handed to him for execution, which he promised to do, and then fraudulently procured said marriage to be had without executing it." The probate was contested on the following grounds: 1st, "that said paper was not executed by said Elizabeth as and for her last will and testament"; 2d, "that said paper, if executed by said Elizabeth as and for her last will and testament, was made without the knowledge, consent, or concurrence of this defendant, her husband"; 3d,

"that said Elizabeth, at the time said will purports to have been made, and at the time of her death, was a married woman"; and, 4th, "that said paper was obtained by fraud and undue influence, exercised over the said Elizabeth by said Martha W. Pritchett and Elizabeth H. Vanhook."

The cause was submitted to the probate judge, without the intervention of a jury; several exceptions being reserved to his rulings, and embodied in a bill of exceptions, from which the following facts appear:

The execution of the will was proved by two of the subscribing witnesses, and the death of the third was shown. These two witnesses further testified that, at the time the will was executed, Mrs. Bransford requested them to keep it a secret from her husband, alleging that she apprehended unkind treatment from him and his family if it were known. "The proponent then introduced John H. Hurt as a witness, who testified, that he lived near Abram Bransford at the time Mrs. Bransford died; that he was in her company often during the last few days of her life, and saw no evidence of feebleness of mind; that she told him of the will, and made the same request of him as to keeping it secret; that he told her he thought her husband ought to know it, and, about ten days before her death, told him of it, and he denied her right to make a will. In one of his visits, a few days before her death, witness heard a conversation between said Bransford and his wife, in which she said, 'I understand you have given Mr. Holding a deed of trust on my negroes, and I want to know if it is so.' Mr. Bransford exhibited a good deal of feeling and irritation, and replied, 'It is a lie, and I want to know who told you so.' She gave him the name of her informant, and he repeated that it was false. Witness further stated, that Mrs. Bransford was an old girl when she married Bransford, and was the sister of John C. Ayres, who lived in Madison county, and who died in October, 1837; that said Ayres resided in Triana when he died, and his plantation was three miles off; that Peter J. Hurt became the administrator on the estate of said Ayres, which position he occupied for several years; that his widow, Elizabeth A., then married a gentleman by the name of Holman, who became the administrator, and removed to South Ala-

Wells, executor, &c., v. Bransford.

bama; that Holman lived but a short time, and his widow then married a man by the name of Lowry; that the widow became administratrix herself after the death of Holman; that Holman, when he removed to South Alabama, appointed Bransford his agent, and left in his possession a portion of the old papers of said John C. Ayres, a box full of which he took to his own house; that the widow, shortly after the death of Holman, or before, removed to South Alabama, and left the Ayres plantation under the control of witness, who has in his possession the old Ayres papers left on the place, and also the box of papers taken off by said Bransford, which, after the death of his wife, and when he was about to break up house-keeping, he returned to the plantation. Witness further testified, that said deceased never had any children; that said Martha W. Pritchett and Elizabeth H. Vanhook were her neices, and were in necessitous circumstances; that all her other near relations were independent; that Bransford came to his house, two or three days after the death of his wife, and commenced a conversation in regard to her will, in which he denied that she had any right to make one; that witness told him he must be mistaken,—that Peter Hurt had told witness that there was a marriage contract; that said Bransford replied, 'No, there is none'; that witness then said, 'You had better be cautious, for I am of opinion that I now have it among John C. Ayres' old papers'; to which said Bransford replied, 'No you haven't, for I burnt it.' It was further proved that a thorough search had been made, among all said papers, for such a contract, at the instance of said Vanhook, but without success."

The proponent then read the deposition of Peter T. Hurt, who testified, that he knew Mr. and Mrs. Bransford, but did not recollect when they were married, or whether he was present at their marriage; that "the said Elizabeth owned some negro property, prior to her marriage, but he does not know how much, and does not know what has been the increase of it"; that "there was a marriage contract between the said Elizabeth and Abram Bransford," and witness "saw said contract, several years after the marriage, among the papers of John C. Ayres"; "that said contract was in writing, and was signed by said Elizabeth and Abram Brans-

ford"; that "his best recollection is that said contract related to the negro property of said Elizabeth, and reserved the right and title of said property to her, and said Bransford gave up whatever title he might have in said property as the husband of said Elizabeth"; that said contract, when witness last saw it, was in Madison county, among the papers of John C. Ayres, but he does not know where it now is; that "his best recollection is that said contract reserved said property to the sole and separate use of said Elizabeth." This witness further testified, in answer to the cross-interrogatories, "that he never saw said contract before said marriage,—did not see it signed, don't recollect to have ever heard said Abram say any thing about said contract, don't know that said contract was made before marriage,—derived his information from the written contract which he found among the papers of said Ayres"; "that he first saw said contract in 1837 or 1838, in the county of Madison, at the house of said Ayres,—saw it there more than once—does not recollect how often, but a great many times,—read it, but does not know how often"; "that the name 'Abram Bransford' was signed to said contract,—did not see him sign his name, but believes it to have been his signature from his (witness') knowledge of his handwriting,—has seen him write frequently, and knows his signature,—has seen him write at his own home, Huntsville, and at many other places, but does not recollect how often,—has seen him write letters and promissory notes"; that he "cannot recollect the words of said contract, and does not recollect positively whether or not the words 'sole and separate' were used in it"; that he "has a distinct recollection of the provisions of said contract, though he does not recollect the words"; that he "does not know whether said contract embraced all the negroes or not, but his best recollection is that it embraced all"; that "the names of Abram Bransford and Elizabeth Bransford were signed to said contract, and witness believes it to have been written by Abram Bransford,—does not know that it was written by said Abram, but believes it was from the fact that it resembled his handwriting"; that "he cannot state the contents of the writing more fully than he has already done"; that "the said negroes lived with said Abram and Elizabeth Bransford after their marriage."

The proponent then read the deposition of Mrs. Elizabeth A. Lowry, who testified, that Abram and Elizabeth Bransford were married at her house, and in her presence; that Mrs. Bransford, at the time of her marriage, owned several negroes, the names of which she cannot recollect; that there was a marriage contract between them, prior to their marriage, in relation to these negroes. "It was written. I can't say positively whether it was signed or not, but to the best of my recollection it was signed by Elizabeth Ayres and Abram Bransford. The contract related to a girl, named Louisa. That girl was given to Elizabeth Ayres, to dispose of as she wished. If it related to any other property, I don't recollect it. I last saw it (said contract) at my house, in Madison county, but cannot tell where it now is. The girl Louisa was secured to the separate use of the said Elizabeth. I saw the instrument, and recognized it to be in the handwriting of Abram Bransford, knowing his handwriting well. From the best recollection I have of the instrument, the one shown to me as a copy is not the same that I saw; for the girl Louisa, in the instrument I saw, was secured to the separate use of Elizabeth Ayres." [*Cross-examined.*] "I saw the contract before they were married. I did not see it signed, nor did I hear said Abram say that such contract was made before marriage. I know the contract was made before marriage, because I saw it, and heard it read. I saw it at my house several times, and heard it read once. I did not see him [Abram Bransford] write it [his signature], but knew his handwriting. I have seen him write, at various times, at his own, and at my house, and have often received letters from him. I cannot [give the language of said contract, or say that the words 'sole and separate use of the said Elizabeth' were used in it, or say what its precise provisions were.] I have no positive recollection of the language of the contract; but the purport of it was to give Elizabeth Ayres the negro Louisa. I only recollect that the negro Louisa was mentioned. I cannot [say that said contract used the language, 'her own individual property, free from the rights of her husband', or 'a separate right in said slaves, free of the contracts of Abram Bransford'.] Abram Bransford had possession of all her [his wife's] negroes, after they were married."

[*Re-examined.*] "I cannot state the contents of the agreement, in full; but I know that, in the instrument I saw, the girl Louisa was given to Elizabeth Ayres."

"John H. Hurt also testified that, at the request of said Abram Bransford, since this litigation has been pending, he looked over the old papers of said John C. Ayres, and furnished defendant with specimens of said Ayres' handwriting, giving him such old papers as he supposed to be in his handwriting.

"The defendant proved, by the plaintiff's witnesses, on cross-examination, that they never saw any unkind treatment of the deceased by the said Abram; and, by some of them, that they were intimate in the family, and that the best state of feeling seemed to exist between them. The defendant also read the deposition of Peter T. Hurt, taken as upon cross-examination," who testified as follows: "I was administrator of John C. Ayres, and took charge of his papers. I found among the papers the marriage contract spoken of in my former deposition; but I do not know how it came among them, or who deposited it there. I am acquainted with the handwriting of said Ayres; I lived with him for several years, and have often seen him write. I can't say that said contract did [have any writing on the back of it], or did not; I don't now recollect. I think I could identify the contract I saw among said papers, if shown to me. I have examined the paper marked 'Exhibit A'; and, from my knowledge of the handwriting of said Ayres, I believe the endorsement thereon, 'E. H. Ayres with John C. Ayres', to be his handwriting. I do not think the paper here shown me, marked 'Exhibit A', is the one I saw among the papers of said Ayres; it is, to the best of my knowledge, in the handwriting of Abram Bransford. I don't think it is exactly, in substance, the same I saw among the papers of said Ayres. My best recollection is, that the contract I saw among the papers of said Ayres was signed by Elizabeth Ayres (not Bransford) and Abram Bransford; but in this I may be mistaken. I think it mentioned the names of negroes; but what names, and to what extent, I do not recollect. I am not [prepared to say positively that said contract secured to Elizabeth Bransford's separate use, absolutely and unconditionally, all the negroes she had previous to her marriage.]"

"Exhibit A", referred to by this witness, is a writing signed by Abram Bransford, endorsed "E. H. Ayres with John C. Ayres", and in the following words: "Whereas, it is expected that Elizabeth H. Ayres and Abram Bransford will be married in the course of a few days, and she, the said Elizabeth, being desirous of making some provision of the negroes that she now owns, as follows: Provided it should be so ordered by Providence that she, the said Elizabeth, should have children, the said negroes is to go to them; and if the said negroes should overgo an equal proportion with my children, then shall no deduction be made off them; though it is to be understood that they shall be put on equal footing with my other children, provided the above negroes should fall short, by death or some other disaster. Given under my hand, this, the 27th day of June, 1832."

"The defendant then introduced as a witness Mrs. Elizabeth Collier, who testified, that the deceased, some time in July prior to her death, came to her house, in company with two neices, the legatees mentioned in her will, and requested witness to send to Triana for Dr. Debow, M. A. Lewis and James S. Lewis, who were the attesting witnesses of the will propounded for probate,—that she wanted to make a will. Witness asked her, if her husband would be there; she said, 'No, that she did not want him to know it,—that she was going to make a will without his knowledge or consent. Witness went out, to call a servant to send; and when she returned, the deceased informed her, that she need not send,—that she would postpone making it. The deceased told witness, on that occasion, that her husband was unkind to her, and, if he should know of her making a will, would treat her with greater unkindness; but witness, who had visited in the family, never saw any unkindness. The deceased also enjoined secrecy on her; and said to her, in this conversation, that there was no marriage contract between her and her husband,—that there was a writing, but it did not amount to a marriage contract. There was no evidence as to what the deceased considered a marriage contract. This witness further stated, that said deceased, within a few years after her marriage with said Bransford, told witness that she wanted her to persuade her husband (Abram) to make a mar-

riage contract,—that there was a paper, but it did not amount to a marriage contract.

“The defendant then introduced as a witness Sally Bransford, who testified, that she was the wife of the defendant's son, and had lived in the defendant's house for about two years prior to his wife's death; that she never saw any unkindness between them; that Mrs. Bransford, the day she went to Vanhook's to make her will, came into her room, and told her that she was going to see Mrs. Pritchett, who was very sick; that Mrs. Pritchett's husband came for her; that, when she returned the next day, she said Mrs. Pritchett was much better and had been able to get up to breakfast. This witness said, that she heard Mrs. Bransford, some six or eight weeks before her death, say that she had made no marriage contract with her husband when she married, and that she did not think it right to do so, as it had a tendency to interrupt the harmony of families; that this conversation took place in the presence of witness and a Miss Harrold, a half-sister of witness; that the deceased made the remark in reply to Miss Harrold, who told her of the marriage of some young lady who had made a marriage contract; that the conversation occurred in witness' chamber, at Abram Bransford's residence; that Miss Harrold and the deceased were sitting up with her child, who was sick. To show that this witness had made different statements about this conversation, and to discredit her, the plaintiff read her two depositions taken in this cause”, in which she gave the following accounts of it: “Said Elizabeth told me, some short time before her death, some seven or eight weeks, that there had never been a marriage contract between her and her husband,—that she believed such a thing had a tendency to create bad feelings. This conversation took place in the company of several persons, and originated in this way: One of the company mentioned a young lady getting married and making a marriage contract; when Mrs. Bransford replied, that she did not think it right, that she did not make one when she married Mr. Bransford, and that she thought it made interruptions between man and wife.” “The conversation alluded to took place at the house of Mrs. Bransford, where I was at that time living as a member of the family, some time in June or

July, 1851. Those present at the time were, old Mrs. Bransford, deponent, and a half-sister of deponent's by the name of Ann Harrold."

The defendant then read to the court the written notice, which the proponent had served on him, to produce on the trial the marriage contract between himself and his wife, and produced the paper above set out as "Exhibit A" to Hurt's deposition. The body of the instrument, and the signature, were proved to be in the defendant's handwriting, and the endorsement on it to be in the handwriting of said Ayres, who was proved to have died in 1837. He also introduced as witnesses Samuel Cruse, Geo. P. Beirne and John J. Coleman, for the purpose of proving by them, as experts, that the writing was as old as it purported to be; and the court admitted their evidence, against the proponent's objection. On this evidence, the defendant offered to read the instrument, as original evidence, and as responsive to the notice. The proponent objected to its introduction, on the ground that its execution and authenticity were not sufficiently established, that it was not the contract called for by him in said notice, and because he had not called for it at the trial in pursuance of said notice. The court allowed it to be read as evidence, and the proponent excepted.

The proponent propounded interrogatories under the statute to the contestant, but declined to read his answers thereto on the trial. The defendant offered to read the first and third interrogatories, his answers thereto, and the *jurat*; "and stated, that he did not offer them as evidence of the facts stated in said answers, but merely to show that he had made such answers at that time, to be considered by the court, in connection with the testimony of John H. Hurt, as to defendant's declaration that he had burnt the marriage contract." The plaintiff objected to this; but the court overruled his objection, and he excepted.

"This was all the evidence in the cause; upon which the court dismissed the proponent's petition, and refused to admit the will to probate." The proponent excepted to this ruling of the court, and now assigns it for error, together with the rulings on the evidence above stated.

ROBINSON & JONES, for the appellant, contended,—

1. That the evidence establishes the fact that there was a marriage contract; and a married woman, possessed of a separate estate, may bequeath it, without or against her husband's consent.—Fettiplace v. Gorges, 1 Vesey, jr., 46; Burton v. Holly, 18 Ala. 408.

2. That the paper produced by the defendant below was not the marriage contract to which the witnesses deposed; but, even under it, the wife took a separate estate. By its terms, the husband took an estate for the life of the wife, while the remainder in the property was reserved to the wife's children. He therefore held the remainder, not as husband, but rather as a trustee for such children as might be born to the wife.—3 Stow. 172, 375; 9 Port. 636; 4 Stew. & P. 286; 20 Ala. 338; 11 *ib.* 207; 4 *ib.* 350.

3. That the wife had a right to make a will, whether she had a separate estate or not; because the English law, which held her intestable solely on account of her husband's right, was not of force in Alabama.—Vanderveer v. Alston, 16 Ala. 494; Randall v. Shrader, 17 *ib.* 333; 2 Bla. Com. 498; 1 Wms. on Executors, 42; Roper on Husband and Wife, 170; Osgood v. Breed, 12 Mass. 525; Burton v. Holly, 18 Ala. 408.

4. The litigation as to the marriage contract is not conclusive, and ought not to be allowed in the probate court. In England, a *prima facie* showing only was required.—1 Phill. 352; 3 Add. 235.

5. The court erred in permitting the contestant to use his answers to the interrogatories for any purpose.—Branch Bank v. Parker, 5 Ala. 731; Roberts v. Trawick, 22 *ib.* 491.

S. D. CABANISS and J. W. CLAY, *contra*, submitted written arguments, in which they made the following points:

1. A married woman, at common law, was utterly incapable of making a will or testament, without the consent of her husband; and the only exceptions to the general rule were, a testamentary appointment under a power, properly executed, and a bequest of her separate estate.—1 Williams on Executors, 45-51; 1 Lomax on Executors, 11; 2 Bright on Husband and Wife, 39; 2 East, 555; 1 Vesey, jr., 48; 2 Eng. Ch. R.

26; 4 Man. & Gr. 1076; 3 Crp. Car. 106; 4 Viner's Abr. 164; Sheppard's Touchstone, 402; 2 Wooddeson's Lectures, 459; 2 Coke's R. (pt. 4) 61. But a general assent by the husband, that the wife may make a will, is not sufficient; it must be shown that he assented to the particular will made by her.—2 Bla. Com. 498; 2 Str. 891, 1111, 1118.

2. To entitle the will of a married woman to be admitted to probate, it must be proved to be within one of the exceptions to the general rule; and, in this case, since the husband's consent was expressly disproved, it must be proved that the property embraced in the will was the separate estate of the wife. The only evidence adduced of this fact consisted of the loose and inconsistent statements of two witnesses, who were ignorant of all the legal rules for the construction of writings, who had not for many years seen the paper of which they spoke, did not agree as to its contents, and could not recollect all its provisions. Such evidence is entirely too indefinite, uncertain and unsatisfactory to establish the terms of a written contract, which no lawyer would undertake to construe without having it before him.—*Mitchell v. Gates*, 23 Ala. 438; 9 Wheat. 597; 1 Peters, 600; 2 Mason, 468.

3. The probate court was not limited in its inquiry to the *factum* of the will, but might well examine and determine whether the testatrix had any property which could pass under it.—*Osgood v. Breed*, 12 Mass. 533; *Yates v. Will*, 2 Dana, 215, cited with approbation in 18 Ala. 426; *Holman v. Perry*, 4 Metcalf, 492; *Mullins v. Lyles*, 1 Swan, 337; *Brook v. Turner*, 1 Modern, 211. In England, the proponent of a will, which professed to be made in execution of a power, was not held to strict proof of the execution of the power, because chancery was the proper forum for the determination of that question; and in cases of that character, the probate of the will, so far as the validity of the appointment was concerned, was not conclusive on the rights of the parties contesting it. But the organization and powers of our probate courts are different from those of the ecclesiastical courts in England, from whose sentences there was no appeal; and there seems no good reason why they may not finally adjudicate questions as to proper execution of such

powers.—Goldsworthy v. Crossley, 4 Hare, 145; Barrs v. Jackson, 1 Phil. 584. The probate of the will of a married woman, on notice to the husband, on the ground that the wife had a separate estate in the property, or that she was licensed by her husband to dispose of it, would be conclusive on him, in a subsequent suit for the property.—1 Salk. 291; 1 Phil. (19 Eng. Ch.) 584.

4. The genuineness and antiquity of the instrument produced by the defendant are clearly shown; and it is, doubtless, the marriage contract to which the witnesses depose.

5. The defendant's answers to the interrogatories were not offered as evidence, but might well be considered by the court for the purpose specified.

RICE, C. J.—It is well settled, that where there is an agreement between husband and wife, before marriage, that she shall have to her separate use either the whole or particular parts of her personal property, she may dispose of it by her will, without the consent of her husband.—2 Bright on Husband and Wife, 66, 120; Peacock v. Monk, 2 Vesey, sr., 191; Fettiplace v. Gorges, 1 Vesey, jr., 46; Rich v. Cockell, 9 Vesey, 369; Newlin v. Freeman, 1 Iredell's Law Rep. 514. See, also, Burton v. Holly, 18 Ala. Rep. 408, in connection with Scammell v. Wilkinson, 2 East's Rep. 552.

The legal evidence in the cause, under an application of the rules provided by law for ascertaining its weight and effect, convinces us that there was such an agreement between Abram Bransford and his wife Elizabeth before their marriage, in relation to the slave then owned by her; that it was in writing, and signed by both of them, and duly executed before the marriage; and that, after the marriage, he obtained possession of it, and has either destroyed or suppressed it.

Notice to produce it on the trial was given before the trial. He did not produce it, but produced an instrument signed by himself alone, which is proved to be materially different from it. Secondary evidence of its contents was given by two witnesses, Mrs. Lowry and Peter T. Hurt, who had seen it several times, and read it. Both of them testify that, according to their best recollection, it was signed by said Elizabeth and by said Abram. Mrs. Lowry testifies, that she saw it "*before*

they were married"; that the girl Louisa, owned by said Elizabeth at that time, was secured by said agreement "to the separate use of said Elizabeth"; and that she does not recollect that any other negro was mentioned in it. Peter T. Hurt testifies, that "he has a distinct recollection of the provisions of said contract, though he does not recollect the words"; "that the said contract related to the negro property of said Elizabeth, and reserved the right and title of said property to the said Elizabeth, and the said Bransford gave up whatever title he might have in said property as the husband of the said Elizabeth"; that his best recollection is, that it "reserved the said property to the sole and separate use of the said Elizabeth"; that he has read it "a great many times"; that he does not know whether it embraced all the negroes or not, "but his best recollection is that it embraced all."

If there be any obscurity or uncertainty in the secondary evidence of the contents of the agreement executed by the said Abram and the said Elizabeth, it arises from his suppression or destruction of that agreement. Suppression is tantamount to spoliation, in respect to the presumptions against the party suppressing. And as he is here the contestant, the following maxim applies to him in full force, "*Omnia presumuntur contra spoliatores*."—Bowles v. Stewart, 1 Schoales & Lefroy, 209; 2 Phil. on Ev., (edition of 1839,) 293; 3 *ib.* 1192, 1193, 1195, 1216, 1220, 1222, 1224, 1234; Jackson v. McVey, 18 Johns. 330; Life & Fire Ins. Co. v. The Mechanics' Fire Ins. Co., 7 Wend. 31; 1 Starkie on Ev. 34.

The presumptions which the law requires to be made against him, from the evidence adduced by the proponent of the will, are not overturned by any evidence in the present record.

The proponent having declined to offer as evidence the answers of the contestant to the interrogatories propounded to him for discovery under the statute, the court could not, without error, consider or treat any of such answers as evidence for any purpose on the trial. Br. Bk. at Montgomery v. Parker, 5 Ala. Rep. 731.

It is unnecessary now to decide any thing as to the admissibility of the instrument signed by the contestant and dated 27th June, 1852, or of the testimony of Samuel Cruse, George

P. Beirne, and John J. Coleman, in relation to that instrument. For, conceding the same to be admissible, it cannot affect the result of the case in this court; and on another trial in the court below, we do not know that the same questions of *admissibility* will be presented in the same shape.

Our opinion is, that, upon the evidence contained in the record, the court below should have admitted the will to probate. For the error is disallowing probate, its decree is reversed; and, under what we deem the safer practice in such cases, the cause is remanded.—Code, § 3034.

BETTIS, EXECUTOR, &C., vs. SAINT.

[ACTION ON PROMISSORY NOTE—PLEA OF STATUTE OF LIMITATIONS.]

1. *Presumption in favor of judgment.*—In a suit on a promissory note, where the record shows a judgment on verdict for the plaintiff, while it appears from the bill of exceptions that the defendant pleaded the statute of limitations, that evidence of a subsequent promise was introduced, and that a charge was asked by the defendant predicated on that evidence, it will be presumed, on error, that a replication was filed, and that an issue was before the jury to which the evidence and the charge were applicable.
2. *Exceptions to statute of limitations prescribed by Code.*—A suit commenced within one year from the time the Code went into operation, on a cause of action subsisting at the time of its adoption, is expressly exempted (Code, § 2502; Pamphlet Acts 1853-4, p. 71) from the influence of its provisions as to the limitation of actions.

APPEAL from the Circuit Court of Clarke.

Tried before the Hon. C. W. RAPIER.

The record in this case shows the following facts: On the 16th March, 1852, James H. Saint, the appellee, commenced an action of assumpsit against John Bettis, on a promissory note for \$56 12, dated March 24, 1846, and payable one day after date; but the writ was returned by the sheriff "not found." On the 15th September, 1853, Saint instituted suit, by summons and complaint under the Code, against James

R. Bettis, the appellant, as executor of John Bettis, deceased, to recover the amount of the same note; and in this suit, on the 28th October, 1854, a judgment was rendered for the plaintiff, on the verdict of a jury, for the amount of the note and interest. A bill of exceptions also appears in the record, in these words: "This day (October 28, 1854) this cause came on to be heard. The defendant pleaded the statute of limitations of six years, in the form required by law; and upon the trial of the cause proof was made tending to prove a verbal recognition of the debt sued on, by John Bettis, deceased, the defendant's testator, in 1848, and there rested his case. The defendant, by his counsel, then asked the court to charge the jury, that unless the plaintiff proved a partial payment of the debt sued on, either by the defendant or his testator, or a written promise to pay said debt within six years, by either of them, before the commencement of this action, the jury could not, in this action, find for the plaintiff; which charge the court refused, and the defendant excepted."

The errors now assigned are, 1st, "because the record shows that the verdict should have been for the defendant below;" 2d, "because the court refused the charge asked by the defendant;" and 3d, "because it is manifest that the word '*written*,' found in the bill of exceptions, must be an error in the bill, and the charge asked must have been as set forth leaving out that word."

WILLIAMS & COCKE, for the appellant, contended,—

1. That the record shows that the verdict should have been for the defendant. The note sued on, which is set out, was due more than six years before the suit was brought; the only plea was the statute of limitations of six years; and the record does not show any replication by plaintiff. Upon this state of the record, only a general replication, taking issue on the facts of the plea, can be presumed; and on such an issue the verdict should have been for the defendant. Besides, the bill of exceptions states that there was evidence "tending to show a verbal recognition of the debt"; and such evidence was not sufficient to remove the bar.—*Crawford v. Childress*, 1 Ala. 489.

2. The charge asked should have been given. It cannot

be contended that the action brought in March, 1852, was the same as the present.—1 Stew. & P. 200. Under the law which was in existence when the suit was brought, (Code, § 2490,) the plaintiff could not recover, without showing either a part payment, or an acknowledgment and promise to pay in writing; and this law is not affected, so far as this case is concerned, by the act of February 15, 1854.—*Woart v. Winnick*, 3 N. H. 673. The note was barred before the Code went into operation. It was certainly competent for the legislature to prescribe the kind of proof necessary to remove the bar; and the Code does nothing more.

WATTS, JUDGE & JACKSON, *contra*, insisted,—

1. That the statute of limitations had not perfected a bar when the first writ was issued, 16th March, 1852.

2. That, if the first writ was not the commencement of this suit, the record does not show when the statute effected a bar, counting from the maturity of the note; since it does not show when John Bettis died, nor when letters testamentary were granted to his executor; and his death before the maturity of the note would suspend the operation of the statute until the lapse of six months after the qualification of his executor.

3. That the charge asked was properly refused, even if six years had elapsed before the commencement of the suit; because the recognition of the debt in 1848, as proved, postponed the bar for six years from that time; and the provisions of the Code could not destroy the legal effect of this promise, without violating the constitution in impairing the obligation of contracts.

CHILTON, C. J.—The judgment entry recites that a jury came to try the issue joined, which they found for the plaintiff; and having assessed the plaintiff's damages at ninety-five dollars, judgment was thereupon rendered for that amount. No replication appears in the pleading to the plea of the statute of limitations of six years; and the appellant says we must intend that issue was taken on that plea, and then maintains that the record shows the verdict should have been for the defendant.

This might have furnished good ground for a new trial; but we have no power to order new trials, or to interfere with the verdicts of juries, because they may have found against the evidence. But we must assume that there was an issue before the jury, appropriate to the charge asked by the defendant below; otherwise, the charge would have been abstract, and properly refused for that reason. The admission of proof of a subsequent recognition of the debt, as well as the charge asked, proceeds upon the idea of an issue to which they were applicable.

The only question presented by the bill of exceptions, is whether the section of the Code (§ 2490) which declares that "no act, promise or acknowledgment is sufficient to remove the bar to a suit created by the provisions of this chapter, or is evidence of a new or continuing contract, except a partial payment made upon the contract, by the party sought to be charged, before the bar is complete, or an unconditional promise in writing, signed by the party to be charged thereby," applies to the verbal recognition of the debt shown in this case. The charge brings up this question, inasmuch as it assumes that a verbal promise to pay, which the jury might have inferred from the evidence tending to show a recognition of the debt within six years, was not sufficient to take the case without the influence of the statute.

The action in this case was brought on the 15th Sept, 1853, within less than one year from the time the Code went into operation. The Code provides, that the provisions of the chapter of which section 2490 forms a part, "apply to all subsisting causes of action, except such as suits have been commenced upon, and are now pending, and those upon which suits may be commenced within one year from the time this Code goes into operation."—See Code, § 2502. So, by the express terms of this section, the case before us forms an exception, and is taken without the influence of the provision insisted upon as applicable by the counsel for the appellant. But, if this view were doubtful, the act of 1853-4 (Pamphlet Acts, p. 71) clears up that doubt, and, by express terms, makes the old law apply; so that, whether we look to the Code or to the subsequent act of 1853-4, it is clear the charge was properly refused.

Judgment affirmed.

FIELD'S HEIRS vs. GOLDSBY.

[TRESPASS TO TRY TITLES BY HEIRS-AT-LAW AGAINST PURCHASER, AT SALE MADE UNDER ORDER OF ORPHANS' COURT.]

1. *Settled rule of property binding on courts.*—This court does not feel at liberty to depart from a decision which has been recognized by subsequent cases, and which has probably been acted upon as a practical rule of property, although, if the question presented were an open one, a different conclusion might be attained.
2. *Jurisdiction of orphans' court to order sale of land for purpose of distribution.*—The jurisdiction of the orphans' court to order a sale of an intestate's real estate for the purpose of distribution, under the act of 1822 (Clay's Digest, 224, § 16), attaches on the filing of the petition by the administrator, alleging that the real estate "cannot be equally, fairly, and beneficially divided" without a sale, and its recognition by the court in granting the order of sale; the failure to state in the petition which of the heirs are of full age, is not a jurisdictional fact.
3. *Conclusiveness of proceedings had under such order of sale.*—The failure to issue a citation to the resident heirs, or to make publication as to the non-residents, the failure of the guardian of the infant defendants to deny the allegations of the petition, and the want of proof by deposition of the existence of the alleged ground of sale,—are mere irregularities, which, although they might be sufficient to reverse the proceedings on error, have no weight in a collateral attack.
4. *Failure to give notice of time and place of sale.*—The provisions of the act of 1806 (Clay's Digest, 225, § 24), requiring an executor or administrator to give notice of the time and place of sale, do not apply to sales made by commissioners under the act of 1822, the ratification of which by the court is the test of correctness in complying with the order of sale.

ERROR from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

This action was brought by the plaintiffs in error, as heirs-at-law of Hume R. Field, deceased, against Thornton B. Goldsby, "as well to try titles, as to recover damages for the detention, use and occupation of the south-west quarter of section eleven, in township seventeen, range eight, in the district of lands subject to sale at Cahaba", and lying in Dallas county. The action was commenced in the spring of 1846, and the trial was had in November, 1852. The only plea was the general issue.

On the trial, as the bill of exceptions discloses, the plaintiffs made out a *prima facie* case, by proving their ancestor's title, their own title as his heirs-at-law, the defendant's possession, the value of the rents, &c.; and rested their case. The defendant then introduced a transcript from the records of the orphans' court of Tuscaloosa, which is made an exhibit to the bill of exceptions, and which contains the following proceedings:

On the 30th April, 1835, Constantine H. Perkins, as administrator of said Hume R. Field, deceased, filed his petition in said orphans' court, praying an order of sale of the real estate of his intestate, which embraced the land now in controversy. This petition, which is sworn to, states, "that the heirs and distributees of said estate are the following—that is to say, Nancy Field, relict and widow of said Hume R. Field, who resides in New London, in the State of Connecticut; Harriet H. Perkins, daughter of said Hume R. Field, who resides in Williamson county, Tennessee; Eliza A. Perkins, who is the wife of petitioner; Edward R. Field, who resides in Pulaski, Tennessee; Emily M. Royall, who is the wife of John H. Royall, who resides in the State of Tennessee; Mary F. Tarver, who is the wife of John A. Tarver; Jane M. Field, who is an infant within the age of twenty-one years; and Henrietta S. Field, who is an infant within the age of twenty-one years, and residing in New London, in the State of Connecticut." The order of sale is prayed on the ground that, "owing to the number of heirs and distributees of said estate, the distance which many of them reside from the above-described lands, and the various separate parcels of said land scattered in different sections of the State, said lands cannot be equally, fairly, and beneficially divided among the said heirs and distributees, without a sale thereof."

On the filing of this petition, it was ordered by the court "that Henry A. Snow be appointed guardian *ad litem* to Jane M. Field and Henrietta S. Field, who are infants within the age of twenty-one years; and that citations issue to said John A. Tarver and Henry A. Snow, guardian as aforesaid. And it appearing to the court, from the affidavit of the petitioner, that said Nancy Field, Harriet H. Perkins, Edward R. Field, John H. Royall and Henrietta S. Field do not reside within

the limits of this State, it is therefore ordered by the court, that publication be made in some newspaper printed in the town of Tuskaloosa, notifying the above-named legatees to be and appear before the judge of our said court, on Monday, the 15th day of June next, and defend against said petition, if they see cause." But the record nowhere shows that the terms of this order were complied with.

After two continuances by the administrator, the petition was heard on the 4th August, 1835, when the following decree was rendered: "This day came on to be heard the petition of Constantine Perkins, administrator of the estate of Hume R. Field, to sell the real estate belonging to said estate; and due and legal notice having been given to all the heirs of said estate that were of age, and to the guardian of those that were minors; and the answers of said guardian, denying the allegations contained in said petition, being filed; and it appearing to the satisfaction of the court, by the depositions of Z. B. Snow and Robert Ellyson, that the tracts of land in the petition described, of which said Hume R. Field died seized, cannot be equally, fairly, and beneficially divided among the heirs and distributees of said estate, without a sale thereof: It is ordered and decreed, that" three persons, whose names are mentioned, "be, and they are hereby, appointed commissioners with full authority to sell the lands described in said petition", which are particularly described in the order; "the commissioners giving notice of the time and place of sale, by written advertisements set up at three public places in said county of Tuskaloosa, at least forty days before the sale, and publishing the same in one of the newspapers printed in the town of Tuskaloosa, for three weeks successively before the day of such sale,—sell said land on a credit until the first day of March, 1836, requiring the purchasers to execute their bonds, with good security; and report their proceedings to this court to be holden after such sale."

The next entry, which is dated November 13, 1835, recites that the commissioners came that day, and made their report, which is set out at length in the minute entry, and which shows that Thornton B. Goldsby had become the purchaser of the quarter-section now sued for. The entry then pro-

ceeds,—“And it appearing to the satisfaction of the court that the terms of said sale have been complied with, it is therefore ordered and decreed by the court”, that the said commissioners make conveyances to the other purchasers for the lands bought by them; “and it is further ordered and decreed, that the above-named commissioners do make unto the said Thornton B. Goldsby a title as aforesaid to the following described land—viz., the south-west quarter of section eleven, in township seventeen, and range eight, in the Cahaba land-district.”

The defendant also offered in evidence the deed executed to him by the commissioners, under this order.

“This evidence being before the jury, the court charged them, that the said proceedings of said orphans’ court, and the said deed, gave the defendant a title to the land sued for, and the plaintiffs could not recover; to which charge the plaintiffs excepted”, and which they now assign as error.

WATTS, JUDGE & JACKSON, with whom was GEORGE W. GAYLE, for the plaintiffs in error, contended,—

1. That, on the death of Field, the lands of which he was seized and possessed in fee descended to his heirs, *eo instanti*; subject, however, to be divested by the action of the orphans’ court, 1st, for the payment of debts, or, 2dly, for the purpose of making a fair, equal, and beneficial division among them.

2. That the orphans’ court is one of limited and special jurisdiction, and has no power to order a sale of a decedent’s lands, except under and by virtue of the statute.—Clay’s Digest, 224, § 16. The court cannot, of its own motion, exercise this extraordinary jurisdiction; but its record must affirmatively show that the facts specially set forth in the statute were alleged and proved.—Bishop’s Heirs v. Hampton, 15 Ala. 767; Taliaferro v. Bassett, 3 *ib.* 670; McCartney v. Calhoun, 11 *ib.* 110, 119; Thatcher v. Powell, 6 Wheat. 119; Williams v. Peyton’s Lessee, 4 *ib.* 77; Borden v. Fitch, 15 Johns. 141; Dakin v. Hudson, 6 Cowen, 224; Blann v. Grant, 6 Ala. 110.

3. The statute requires the administrator to set forth, in addition to the ground on which the sale is sought, the names of the heirs, “particularly stating which are of age, and

which are infants or *femes covert*." Unless this is done, the court does not acquire jurisdiction.—Griffin's Heirs v. Griffin's Executors, 3 Ala. 623; Cloud and Wife v. Barton, 14 *ib.* 348; Blann v. Grant, 6 *ib.* 110. The petition in this case does not comply with the statutory requisition.

4. The statute further requires citations to be issued and served at least forty days before the order can be granted, and publication to be made against non-residents. The record is defective in these particulars, and the recitals in the decree cannot aid it.—Bloodgood v. Hartley, 16 Ala. 233; Butler v. Butler, 11 *ib.* 668; Molett v. Kenan, 22 *ib.* 484; Starr v. Scott, 8 Conn. 480; Wattles v. Hyde, 9 *ib.* 10.

5. Before the court can take jurisdiction to order a sale, when the allegations of the petition are denied by the answer, it must be satisfied by proof, taken by deposition as in chancery cases, and filed in the cause; and the mere recitals in the record are not sufficient.—Clay's Digest, 225, § 19; McMekin v. Bobo, 12 Ala. 273; Hill v. Hill, 9 *ib.* 793.

6. It has been held, under the other branch of the statute, where the sale was ordered for the payment of debts, that the proceeding was *in rem*; but those decisions do not cover this case. Here, the heirs are the only persons interested; in the other case, they have no interest, if the property is needed for the payment of debts. No judgment can be held conclusive on a party, until he has notice; and the statute is explicit in requiring notice to the heirs.—McCurry v. Hooper, 12 Ala. 823; Blann v. Grant, 6 *ib.* 110; Jennings & Graham v. Jenkins, 9 *ib.* 285.

7. It is somewhat difficult, in a case like this, to ascertain what is necessary to be done to divest the title of the heirs, as the authorities are slightly conflicting. Wallace v. Hall's Heirs, 19 Ala. 267, and the authorities there cited, show that the title of the heirs is not divested, until a final decree ordering conveyances to be made to purchasers. The record, then, must show that all things, required to be done before this decree, were done. The statute (Clay's Digest, 225, § 24) requires notice of the sale to be given by the administrator or commissioners, by advertisements posted up at three or more public places in the county in which the lands lie, for at least forty days before the sale, and by publication in

some newspaper for three successive weeks before the sale.—Wyman v. Campbell, 6 Port. 245; Gantly's Lessee v. Ewing, 3 Howard's (U. S.) R. 707; Hawkins v. Kemp, 3 East, 410.

8. The record nowhere shows that any citations were issued, except by a general allegation that due and legal notice was given; and nothing in the record shows that any parties appeared. The authorities above cited show that this was essential to give the court jurisdiction, and that it ought distinctly and affirmatively to appear of record.

9. The court is nowhere directed to order what notice of the time and place of sale shall be given, but the statute itself prescribes the notice. In Wyman v. Campbell, 6 Porter, 245, it is conceded that, unless the commissioners pursue the terms of the order, the sale would not be valid. Is not the statute as imperative as the order of the court? and are not the commissioners as much bound to pursue its terms? It positively appears that the commissioners, in this case, did not give the notice required by the statute, in the county in which the lands lie. Is not the purchaser bound, at his peril, to see whether the notice required by the statute has been given? Why is he not as much bound to take notice of this, as to see that the petition sets forth sufficient grounds to give the court jurisdiction, or to know that an administrator cannot sell property at private sale? Any act, in contravention of a positive statute, is not merely voidable, but void.—Fambro v. Gantt, 12 Ala. 298; Ventress v. Smith, 10 Peters, 161.

The case of Wyman v. Campbell, cited for defendant, was decided under the act of 1820, which does not require the names of the heirs, &c., to be set forth; and the *dicta* in the other cases cited are based upon it. The case of Brown v. Lanman, 1 Conn. 469, has been overruled by the later cases above cited.

WM. M. MURPHY and J. W. LAPSLEY, *contra*, argued,—

1. That the petition substantially complies with all the requisitions of the statute, even if the jurisdiction of the court depended on the statement of the ages of the heirs. The statement that two of the heirs are minors, is an implied statement that the others are not, on the maxim "*inclusio*

unius est exclusio alterius." This is the plain and obvious meaning of the petition, and any other construction of it would be hypercritical. The orphans' court was created for the mass of the people, who are unskilled in the technical language of the law, and who use words in their common and ordinary acceptance; and the statute, under which this sale was made, is remedial. To construe such proceeding by strict, technical rules, requiring "certainty to a certain intent in every particular," would defeat the object of the statute, and render it worse than useless to the great majority of those for whom it was intended.

2. That the jurisdiction of the court was not dependent on the statement in the petition of the ages of the heirs, but attached on the filing of the petition by the administrator, stating one of the statutory grounds for ordering a sale; that the proceedings were *in rem* against the estate, and therefore valid without personal notice; and that the several objections urged against their validity, were mere irregularities or errors, which could not affect them in a collateral proceeding.—Wyman v. Campbell, 6 Porter, 245; Duval's Heirs v. McLosky, 1 Ala. 708; Perkins v. Winter, 7 *ib.* 864; Duval's Heirs v. P. & M. Bank, 10 *ib.* 636; Bishop's Heirs v. Hampton, 15 *ib.* 766; Thompson v. Tolmie, 2 Peters, 157; Grignon's Lessees v. Astor, 2 Howard's (U. S.) R. 342; Brown v. Lanman, 1 Conn. 469; 4 Ohio, 129.

GOLDTHWAITE, C. J.—The principal objection which has been urged against the proceedings in the orphans' court, is, that the petition filed by the administrator does not particularly set forth the heirs who are of full age, which, it is insisted, is a jurisdictional fact essential to the exercise of the power to decree a sale of lands under the act of 1822, (Clay's Digest, 224, § 16,) when the sale is necessary to be made in order to make an equal division among the heirs.

In the case of Duval v. McLosky, 1 Ala. 708, an attempt was made collaterally to impeach the proceedings of the orphans' court, directing a sale of land, under the same statute, for the payment of debts of the intestate. The record in that case contained no petition for the sale of the particular lands in question, but simply an order of court reciting that the ad-

administrator had presented a petition in court, praying an order for the sale of the lands described therein, on the ground that the personal estate, and the sales of lands made under a previous order, were not sufficient to pay the debts of the intestate; but there was no recital as to the names of the heirs, their ages, &c. The court held; that the recital in the record showed that a petition had been filed, which described the lands sought to be sold, and disclosed the statutory ground on which the sale was sought; that the jurisdiction of the court attached upon a petition containing these allegations; and that the omission to state the names of the heirs, their ages, &c., was simply an irregularity which could not prejudice the title of a purchaser, under the decree for a sale.—See, also, *Bishop v. Hampton*, 15 Ala. 761.

In *Duval v. The P. & M. Bank*, 10 Ala. 636, so far as we are able to judge from the statement of the case, the same question arose, and the doctrine in the former case was re-applied.

It is true that, in the cases cited, the object of the sale was to pay debts; but that cannot affect the principle. The statute makes the same requirements in each case, and if they are not essential to the exercise of the power of the court in the one case, they cannot be in the other. Could we regard the question as an open one, we might arrive at a different conclusion from that which was attained in *Duval v. McLosky*, *supra*; but after it has been recognized by a subsequent decision, and has probably been acted upon as a practical rule of property, we do not feel at liberty to depart from it.

The jurisdiction of the orphans' court having attached, by the recognition of the petition, the failure to issue a citation to the resident heirs, or to make publication as to the non-residents, or the failure on the part of the guardian of the infant defendants to deny the allegations of the petition, and the want of proof as to the existence of the alleged ground of sale by depositions, are all mere irregularities; and, although either of them might be sufficient to reverse the proceedings, have no weight in a collateral attack.—*Perkins v. Winter*, 7 Ala. 855.

The only remaining question is, whether the proceedings are void by reason of the failure to give the notice of the sale

required by the act of 1806. If it was conceded that the authority of the administrator to sell under the decree, was in the nature of a power, and required the observance of every formality the statute might impose; still, we think, the statute referred to has no application to sales made under an order of court by commissioners. Prior to the act of 1822, under which these proceedings were had, it was the executor or administrator who was ordered to sell, and who conducted the sale; and it is only to cases of this character that the terms of the statute are applicable. Here, however, it was not the administrator who was ordered to sell, but this power was directed to be exercised by commissioners, who are but the ministerial agents of the court; and the test of its correctness, so far as a compliance with the order of sale is concerned, is its ratification by the court.—*Jennings v. Jenkins*, 9 Ala. 285.

Judgment affirmed.

WEST AND WIFE vs. HENDRIX.

[BILL IN EQUITY FOR REDEMPTION UNDER ALLEGED MORTGAGE.]

1. *Existing debt necessary to constitute mortgage.*—A conveyance made in satisfaction of a precedent debt, although it may contain a redemption clause, cannot take effect as a mortgage, since a mortgage is impossible where no debt exists.
2. *Agreement to re-sell does not make absolute deed mortgage.*—When a deed is made for a consideration paid at the time,—whether the payment is made in cash, or by the surrender and satisfaction of a precedent debt,—an agreement on the part of the vendee to allow the vendor to purchase at a future day, for the same or for an advanced price, does not convert the transaction into a mortgage.
3. *Concurrent intention necessary to constitute mortgage.*—To convert a conveyance, absolute in its terms, into a mortgage, the intention and understanding of both parties to that effect must concur; the fact that the party who executed the conveyance intended and considered it as a mortgage, is not sufficient to make it a mortgage.
4. *Inadequacy of price insufficient.*—Inadequacy of price or consideration, of itself, is not sufficient to convert an absolute conveyance into a security for the re-payment of money.

3. *Absolute deed, with bond conditioned to reconvey, held conditional sale, and not mortgage.*—Where S. executed to H. an absolute conveyance for a tract of land, reciting therein a money consideration in hand paid, and took from him a receipt in full of an account held by him against W. for the same amount; and H. at the same time executed to S. a penal bond, which recited the sale, and was conditioned that he should “re-convey” the land on the payment, by a specified day, of a sum of money equal to the amount of the expressed consideration, with interest: *Held*, that the transaction, as evidenced by the deed and bond, was not a mortgage, but a sale with an agreement to re-sell on the payment by the specified day of the stipulated amount; and that the contemporaneous declarations of H., as proved by the subscribing witness, that the transaction was intended as a security for his debt against W., and his subsequent declarations that the debt was still subsisting, together with the facts that the land was worth nearly three times as much as the amount expressed as the consideration, and that S. retained the possession of it without any agreement to pay rent, were not sufficient to convert it into a mortgage.

APPEAL from the Chancery Court of Cherokee.

Heard before the Hon. A. J. WALKER.

This bill was filed by John C. West and wife, the appellants, against John M. Hendrix and W. W. Jackson; and its material allegations were the following: That on the 26th June, 1847, complainant Sarah, who was then unmarried, and whose name at that time was Sarah Smith, was seized of a certain forty-acre tract of land, and said John C. West was at the same time indebted to said Hendrix, by open account, in the sum of \$53 71; that said Hendrix, pretending to be anxious to secure said debt, proposed to complainant Sarah that, if she would convey said tract of land to him, he would give West until the first day of January then next to pay said debt; that complainant Sarah assented to this proposal, and executed to said Hendrix a deed for said land, taking from him at the same time a bond, of which the following is a copy:

“The State of Alabama, } Know all men by these pres-
Cherokee County. } ents, that I, John M. Hendrix,
am held and firmly bound unto Sarah Smith, in the just and full sum of one hundred dollars, good and lawful money, for the payment of which I bind myself, my heirs and assigns forever. In witness whereof, I hereto set my hand and seal, this 26th day of June, 1847. The condition of the above obligation is such, that whereas the said John Hendrix has

this day bought of the said Sarah Smith a certain tract of land, known as the south-west fourth of the north-east quarter of section No. 6, in township No. 10, range No. 10, in the Coosa land-district, for and in consideration of the sum of \$53 71, to her in hand paid: Now, if the said John M. Hendrix shall, on the payment of the sum of \$55 91 on or before the first day of January next, re-convey the said tract or parcel of land to the said Sarah, by making such title as he may possess by virtue of her deed of this date, then the above obligation to be void", &c. (Signed by said Hendrix, and attested by Polly Wester.)

The bill alleges "that said deed and bond were mutually executed for the purpose of securing to said Hendrix the payment of said sum of money due to him by said West, and for no other purpose,—that being the way, according to the representations of said Hendrix, in which said security could best be given"; that complainants are ignorant of the force and effect of legal instruments, and confided in the honesty of said Hendrix, who himself drew up the writings; that Hendrix, when the money became due, expressed a willingness to wait until complainants could procure it, if within a short time; that complainants were married on the first day of March, 1849; that in March, 1849, he instituted suit against them to recover possession of said land, and recovered a judgment for it at the Fall term of the court; that Jackson claims to have bought said land from Hendrix about the time said money became due; and that on the first day of June, 1851, complainants tendered to him the "full amount of principal and interest due on said obligation", and demanded a re-conveyance of said land, which he refused.

The prayer of the bill is, "that your Honor, upon final hearing, may decree either that said Hendrix's deed to said Jackson, if any such appears to have been made, be canceled, and the sale set aside, so far as complainants' rights are concerned, and that said Hendrix re-convey said land to complainant Sarah, on payment of said money and interest; or, if it should seem more equitable to your Honor, that said Jackson be decreed to convey said land to said Sarah, on payment of said money and interest"; that the said judgment at law be enjoined; and for other and further relief.

Hendrix and Jackson filed a joint answer, but it is unnecessary to notice the allegations which concern the latter. The answer admits all the allegations of the bill, except as to the purpose and intent with which the deed and bond were executed, and the alleged tender to Jackson; and avers that the transaction between Hendrix and complainant Sarah was an absolute and unconditional sale and purchase of the land, in absolute payment of the debt due from West to Hendrix, and that the execution of the bond was a mere voluntary act on the part of Hendrix, to allow complainant Sarah to repurchase the land on the terms therein specified. The answer alleges, also, that said tract of land was entered by said West, in the name of said Sarah Smith, by whom he had several children, with money belonging to said Hendrix; and that, on the latter remonstrating with West about it, the land was finally sold and conveyed to him by said Sarah, in payment of the money due from West.

A demurrer to the bill, for want of equity, was overruled by the chancellor; and the cause was submitted for final decree, on bill, answer, exhibits and proof. The witnesses examined on behalf of the complainants, were Polly Wester, James Wester, Joseph Reed, D. C. Webb, and John Angle; and on the part of the defendants, John S. Wilson, A. Wester, Joseph Smith, and George Wester. The substance of their evidence may be thus stated :

Polly Wester.—"Mr. Hendrix and the said Sarah came to my house together, in June, 1847; and Mr. Hendrix asked me to sign a bond with him. Upon my stating that I was no scholar, and did not wish to sign any paper, Hendrix replied, 'There is no harm in it; I am taking a lien on the said Sarah's land, or certificate, to secure an account I have on John C. West; and the bond is only for the forthcoming of the certificate. If the money on my account is paid the first day of January coming, or any time through the winter, I am no ways particular.' The demand he had was in writing, and he called it an account; I do not know what it was for. Hendrix brought the said certificate and bond together, and, whilst in my presence, gave the said account to the said Sarah. I know of no proposition or conveyance other than I have stated. I did not hear of any deed from said parties.

Hendrix stated that he had taken a lien on said Sarah's land to secure the payment of his account against West, and gave her the bond and the account. I witnessed said bond. I never signed any other papers for the said parties, either on that day or any other day. I did not see the said Sarah give Hendrix any paper. Hendrix had a paper when he came to my house, which he said was a certificate of the said Sarah's land." [*Cross-examined.*] "I am a sister of John C. West. I cannot read or write. Hendrix read said bond to said Sarah. I am certain he told her that the bond was for the forthcoming of said certificate, provided the money on his account was paid by the first day of January, or during the winter; I am not mistaken about this."

James Wester.—"I had (?) a conversation with Hendrix at the steam-mill in Cedar Bluff; I believe it was in the spring of 1848,—it was the spring after he got the deed from Sarah Smith. Hendrix came to John West, and asked him if he had his money for him yet. West said the money was owing to him by the steam-mill folks, but he had not got it. Hendrix said he was obliged to have money, and he thought he could get money by putting the land in pawn to McElrath. West told him, if he could get the money for twelve months by letting McElrath have the land in pawn, with the right reserved for him to redeem it, that he thought he could have his money for him in that time. Hendrix said he would do it,—that he did not want (*the land?*), that all he wanted was his money, for he was needing money. The land was worth, in June, 1847, \$150 to \$200. I do not know that he then told me what money it was he took the deed to secure. Hendrix told me, after this suit commenced, that he took a lien on the land from Sarah Smith to secure a debt that West owed him for money he had used of a co-partnership transaction between them. John West was in possession of the land, with Sarah Smith, at the time the deed was made. She kept house for him; after which he married her, and has been in possession of the land ever since the marriage. It was notorious in the neighborhood that they claimed the land as theirs, and always contended that Hendrix only had a lien on it. I had a conversation with Jackson, after he bought the land, and asked him if he did not know, when he

bought it, that he would have a fuss about the title. He said that he knew it, but it made no difference,—that Hendrix was bound to put him in possession, and if he did not it was no trade."

Joseph Reed.—"Heard a conversation between West and Hendrix at the steam-mill at Cedar-Bluff in Cherokee county. West was to have the money for him by a certain time, but witness does not now recollect at what time. Heard Hendrix say, at another time, that he took a deed from Sarah Smith to secure the money of his that West had used to enter the land with; but witness does not recollect the time and place of this conversation, but it was after the deed was made. The land was worth, in 1847, \$100, or thereabouts. Complainants were living on the land at the time the deed was said to be made to Hendrix, and at the time Jackson bought it of Hendrix, and claimed it as their own, which was notorious in the neighborhood."

D. C. Webb.—"I was present at one time, and saw West have a roll of money, but did not see how much there was. He said to Hendrix, that he wanted him to sign a deed to that land, and that he had the money to pay him. When West first began to talk, Hendrix turned off and left, without saying any thing; and West then called on me to witness."

John Angle was examined as a witness for the defendants, but his deposition was read in evidence by the complainants. He testified, "that West told him that he had met Hendrix somewhere between his (West's) house and steam-mill; that he does not recollect all that West said, but it was about a mortgage or deed of trust on the land that Hendrix wanted to secure himself,—that Hendrix wanted to sell the land, and to give West twelve months to redeem it, and that West told Hendrix to go Sarah, or not to go to Sarah, witness does not recollect which; that he heard West say, some time afterwards, that he would not give Hendrix possession, because he had practiced a fraud on Sarah by obtaining a deed when it was represented as a mortgage; that West said he objected to Hendrix selling the land to Jackson, because he thought Jackson would not let him redeem it; that Hendrix said he would sell the land to McElrath, and that West should have one year to redeem it in, and that Sarah was to

have the land whenever he got the money that he claimed from West."

Joseph Smith.—"Lived on said land about one year, in 1848 or 1849, and built the house in which he lived. Applied to said John C. and Sarah West for leave to reside on said land, and they told him that he must see Hendrix in order to get leave,—that the land was the said Hendrix's, unless he (West) paid him some money by a certain time; that Hendrix had given him a certain time to raise the money, and that, if he raised it, Hendrix was to let him have the land."

George Wester testifies, that West, at and before the time when the land was entered, was insolvent.

A. Wester testifies, that West told him "he intended tendering Hendrix the sum of money for the land in controversy, but that he (Hendrix) should not have the said money"; and that he heard Hendrix say, at a time not recollected, "that he had taken a deed to the land in controversy in payment of what West owed him, and that the land was to be West's if he redeemed it at a given time."

John S. Wilson testifies, that he once had a deed in his possession for the land in controversy, executed by Sarah Smith to said Hendrix; that the deed was given to him by Hendrix, to be recorded, witness then being clerk of the county court of Cherokee; "that he presented said deed to said Sarah, who acknowledged it, stating to Hendrix, who was present at the time, that she desired him not to sell said land." He also proves the handwriting of Hendrix to a receipt, appended to an account against West showing a balance of \$53 71, which was in these words: "Rec'd the above, fifty-three dollars and seventy-one cents, in full, of J. C. West, *pr.* Sarah Smith." (signed) "J. M. Hendrix, June 26, 1847."

The chancellor, on final hearing, dismissed the bill, and his decree is now assigned for error.

D. W. BAINE, for the appellants, contended,—

1. That the deed and bond for title, in connection with the sole fact that the deed was founded on a pre-existing debt, upon their face constitute a mortgage.—*Hinson v. Partee*, 11 Humph. 587; *Marshall v. Stewart*, 17 Ohio, 356; *Bacon*

v. Brown, 19 Conn. 29; Kemp v. Earp, 7 Iredell's Eq. R. 167; Hammond v. Hopkins, 3 Yerger, 525. In all the cases decided by this court, holding that a bill of sale, with a defeasance, is not on its face a mortgage, the payment of the purchase money and interest is not stipulated; with the single exception of McKinstry v. Conly, 12 Ala. 678, where other words in the defeasance clearly showed its character.

2. That the written contract, controlled and explained by the parol proof, constitutes a mortgage. The undisputed facts of the case show all the *indicia* of a mortgage: there was an existing debt due, not from the grantor, but from a third person; Hendrix told the witnesses to the bond, at the time it was executed, that he was taking a lien on the land to secure the debt which West owed him; the possession of the land remained in the grantor, without any contract to pay rent; and the land was worth three times the amount of the purchase money stated in the deed.—Turnipseed v. Cunningham, 16 Ala. 508; Eiland v. Radford, 7 *ib.* 724; Russell v. Southard, 12 Howard, 139; Hudson v. Isbell, 5 Stew. & P. 77; May v. Eastin, 2 Porter, 426.

3. That parol proof is admissible to show that the transaction was intended as a mortgage.—Eiland v. Radford, 7 Ala. 724; Hudson v. Isbell, 5 Stew. & P. 77; McKinstry v. Conly, 12 Ala. 678; Robinson v. Farrelly, 16 *ib.* 476; Russell v. Southard, 12 Howard, 139.

4. That the delivery and receipt of West's account, at the time the bond and deed were executed, did not extinguish the debt; and that the declarations of Hendrix, at the time of the transaction and subsequent to the law-day mentioned in the bond, showed that he considered the debt against West as still subsisting.—Turnipseed v. Cunningham, 16 Ala. 508; Locke's Executor v. Palmer, 26 Ala. 322; Russell v. Southard, 12 Howard, 139; Brown v. Dewey, 1 Sandford's Ch. R. 57; Bacon v. Brown, 19 Conn. 34.

5. That, if the evidence even left it doubtful whether a mortgage or a conditional sale were intended, it would be held a mortgage.—Locke's Executor v. Palmer, 26 Ala. 322, and cases there cited.

JAS. B. MARTIN and M. J. TURNLEY, *contra*, insisted,—

1. That, admitting that the transaction, on the face of the

deed and bond, might be construed either a mortgage or a conditional sale, its true character was to be determined by the intention of the parties, as ascertained from the attendant circumstances.—Poindexter v. McCannon, 1 Dev. Eq. R. 372; Freeman v. Baldwin, 13 Ala. 246; McKinstry v. Conly, 12 *ib.* 678.

2. That there can be no mortgage, where there is no mortgage debt to be secured.—Conway's Executors v. Alexander, 7 Cranch, 218; 2 Edwards' Ch. R. 143; McKinstry v. Conly, *supra*.

3. That the evidence shows that the debt against West was extinguished, and that no new debt was created.—Powell on Mortgages, vol. 1, p. 335.

RICE, J.—A mortgage is essentially a security for a debt. When no debt exists, a mortgage is impossible.—Conway v. Alexander, 7 Cranch, 218; Chapman v. Hughes, 14 Ala. Rep. 218.

When a conveyance is made in satisfaction of a precedent debt, it cannot take effect as a mortgage, although containing a redemption clause; for, the previous debt being extinguished, and no new one created, one of the essential attributes of a mortgage is wanting.—Poindexter v. McCannon, 1 Devereux's Eq. Rep. 373; Holmes v. Grant, 8 Paige, 243; Robinson v. Cropsey, 6 Paige, 480; same case, 2 Edw. Ch. Rep. 138; McKinstry v. Conly, 12 Ala. Rep. 678; Freeman v. Baldwin, 13 Ala. R. 246; Goodman v. Grierson, 2 Ball & Beatty's Ch. Rep. 274.

When a deed is made for a consideration *paid at the time*, whether the payment is made in cash, or by the surrender and satisfaction of a precedent debt,—it will not lose the character of a conveyance, by an agreement on the part of the vendee, to allow the vendor to re-purchase at a future day, for the same price, or for an advanced price.—Glover v. Payne, 19 Wend. R. 518; Brown v. Dewey, 2 Barb. Sup. Ct. Rep. 28; Williams v. Owen, 5 My. & Cr. 303; Flagg v. Mann, 14 Pick. Rep. 467.

The fact that the party executing a conveyance, absolute in its terms, intended and considered it as a mortgage, is not sufficient to make it a mortgage. To produce that effect,

such must have been the clear and certain intention and understanding of the other party likewise.—*Holmes v. Fresh*, 9 Missouri Rep. 200; *Chapman v. Hughes*, 14 Ala. R. 218; *Hickman v. Cantrell*, 9 Yerger, 172; 4 Kent's Com. 142; *McDonald v. McLeod*, 1 Iredell's Eq. Rep. 221.

Inadequacy of price or consideration, alone, will not convert an absolute conveyance into a security for the repayment of money.—*Conway v. Alexander*, *supra*; *Holmes v. Fresh*, *supra*; *Lane v. Dickerson*, 10 Yerger, 373; *Moss v. Green*, 10 Leigh, 251, and cases therein cited by Parker, J.

The transaction which the complainants allege to be a mortgage, occurred on the 26th June, 1847, between the defendant, Hendrix, and the complainant Sarah, who was then unmarried and known by the name of Sarah Smith. The debt, which it is alleged was intended to be secured by the transaction, was a debt for \$53 71, due to Hendrix by John C. West, by account. Hendrix receipted the account as follows, "Rec'd the above fifty-three dollars and seventy-one cents, in full, of J. C. West, *pr.* Sarah Smith. J. M. Hendrix, 26 June, 1847."

The account, thus receipted, was surrendered to Sarah Smith; and she executed the absolute deed to Hendrix, and received from him an instrument, a copy of which is shown in 'Exhibit A' to the bill. There was no debt between Sarah Smith and Hendrix, and no loan.

After this transaction, we cannot see from the evidence, how Hendrix could have compelled payment, either from Sarah Smith or John C. West. The evidence is insufficient to authorize us to say that the debt of John C. West to Hendrix was not satisfied by this transaction, or that any new debt was created. The rule is, that when there is a deed absolute in its terms, and the right of redemption is denied by the answer, a court of equity will not treat it as a mortgage, unless the proofs are clear, consistent, and convincing, that it was not an absolute purchase, and that the object of the transaction in its original construction, as understood by both parties, was to create a security for money.—*Chapman v. Hughes*, *supra*; *Freeman v. Baldwin*, *supra*; *Bryan v. Cowart*, 21 Ala. Rep. 92; *Brantley v. West*, 27 Ala. Rep. 552; *Franklin v. Roberts*, 2 Iredell's Eq. Rep. 560; *Lane v. Dickerson*, 10 Yerger, 373; *Moss v. Green*, *supra*.

Our opinion is, that the transaction was not a mortgage, but a sale accompanied by an agreement to re-sell on the payment of \$55 91, on or before the 1st day of January next after the sale.—Hickman v. Cantrell, 9 Yerger, 172; Lane v. Dickerson, 10 Yerger, 373.

The decree of the chancellor is affirmed, at the cost of the appellants.

HAIR ET AL. vs. LITTLE ET AL.

[TRESPASS QUARE CLAUSUM FREGIT ET DE BONIS ASPORTATIS.]

1. *Admissibility of parol evidence to affect consideration clause of deed.*—Where the consideration expressed in a deed is a certain sum of money in hand paid, parol evidence is admissible to show that only a part of the money was paid, and that the balance was to be applied in discharge of certain debts due from the grantor to third persons.
2. *Objection to competency of witness, when raised.*—An objection to the competency of a witness on the ground of interest, when known at the time of filing cross-interrogatories, must be distinctly made before the witness is examined.
3. *Declarations explanatory of possession.*—The declarations of a party in actual possession of personal property, tending to explain his possession, are admissible evidence as part of the *res geste*.
4. *Liability of joint trespassers.*—In trespass against two, if the evidence authorizes exemplary damages against one, the other, if he is shown to have acted in concert with him, is liable to the same extent.
5. *What is abstract charge.*—A charge is not abstract, when there is any evidence, however weak, at all tending to support it.
6. *Burthen of proving fraud.*—Where plaintiff and defendant both claim under purchases from the same person, by conveyances valid on their face, the party alleging fraud in the purchase of the other is bound to prove it; but when one of the conveyances is impeached for fraud, the burthen of proof is changed, and the evidence of fraud must be overcome by counter evidence of *bona fides*.
7. *Measure of damages.*—In trespass for taking and carrying off slaves, the court charged the jury, "that, if they found for the plaintiffs, the measure of damages would be the highest value of the slaves at any time between the taking and the trial; that, in addition to this value, they might allow interest thereon, or might look to the value and hire as some guide in coming to a conclusion, but were not bound by them": *Held*, that the charge was not erroneous.

8. *Exemplary damages, when allowable.*—Exemplary damages, or “smart money”, may be allowed to the plaintiff, in trespass for taking and carrying away his goods, when there are circumstances of aggravation attending the trespass.
9. *Charge held erroneous, because invading province of jury.*—In charging the jury that they might give exemplary damages if the trespass was accompanied with circumstances of aggravation, the judge “playfully remarked, in the way of illustration, ‘such damages as would teach the old gentlemen not to violate the Sabbath, nor injure his health by riding in the night, nor interfere with the rights of others’”: Held, that the instructions were erroneous, because the remarks were calculated to make the jury believe that the judge thought the facts justified heavy exemplary damages.
10. *Absolute sale by bailee held conversion.*—An absolute sale of a slave, by one who has possession under a contract of hiring, does not transfer to his vendee the right to the unexpired term, but is a violation of the contract of hiring, and gives the owner the immediate right to take peaceable possession, if he can.

APPEAL from the Circuit Court of Sumter.

Tried before the Hon. GEO. D. SHORTRIDGE.

This action was brought by Gray Little and Patrick S. Cromwell, the appellees, against James Hair and Sterling H. Jones, “to recover damages for breaking and entering the plaintiffs’ close, and carrying off sundry slaves, mules, and wagons, the property of plaintiffs.” The defendants pleaded, jointly and severally, in short by consent, not guilty, with leave to give in evidence any special matter of defence. All the evidence in the case is set out in the bill of exceptions; but it is only necessary to notice particularly the facts bearing on the points here decided.

The plaintiffs claimed the slaves and other property under a purchase from one Blake Little, by bill of sale dated May 29, 1848, which purported to be made “in consideration of the sum of \$32,000 in hand paid”; while the defendant Hair claimed the slaves under a purchase from said Blake Little, by bill of sale dated May 26, 1848, which recited a consideration of \$3,539 55. The plaintiffs offered in evidence the deposition of Henry G. Little, who was a son of Blake Little, and the subscribing witness to the conveyance from said Blake Little to the plaintiffs. The fourth interrogatory propounded to this witness, and the answer thereto, were as follows: “*Int. 4.*—What did Gray Little and Patrick S. Cromwell give or do, or what were they to do, or what did they

assume to do, in consideration of the said conveyance and bond? If they assumed the payment of debts for the said Blake Little, please state what amounts they assumed, and to whom they were payable. What kind of a sale was it? What was said at the time, or at any other time, about its being a mortgage or deed of trust"? *Answer.*—"They were to give about the sum of \$32,000. They assumed to pay debts in favor of Bliss, Russell, Mrs. Vandegriff, Ash, Abner Hearts, Steele, and others not recollected. The amounts also not recollected. I heard the sale made, and never heard any thing said about a mortgage or deed of trust." The defendants objected to that portion of this answer which is italicized, "on the ground that it showed a consideration different from and inconsistent with the consideration recited in said bill of sale"; but the court overruled their objection, and they excepted. This witness further testified, "that he saw no money paid at the time the bill of sale was given, and heard no agreement to pay money; that he saw Gray Little, a few days after the sale, pay Blake Little \$700 or \$800, but he does not know whether it was in consideration of the sale or not."

The plaintiffs then offered in evidence the deposition of said Blake Little, after proving the execution of a release from themselves to him, which was attached to the deposition. This deposition was taken on interrogatories and cross-interrogatories; and the defendants, before filing their cross-interrogatories, reserved the following exceptions to the competency of the witness: "The defendants except to the competency of Blake Little to impeach any contract made by him with the defendant Hair; also, to prove that, subsequent to his conveyance to Hair of the slaves mentioned in the interrogatories, he conveyed them to another or others; also, to his competency to prove the validity of such subsequent sale and conveyance, and the invalidity of his sale to Hair; also, to his competency to prove any facts tending to any of said foregoing matters; and defendants except to each and every interrogatory tending to obtain such testimony." The defendants objected to the reading of the deposition of this witness, "on the ground that it showed the witness to be incompetent from interest; but the court ruled that he was

competent, and allowed the deposition to be read; to which the defendants excepted."

Blake Little testifies, among other things, that he and Hair were joint administrators on the estate of one Jenkins; that he purchased certain negroes, at a sale made by them, to the amount of about \$3,000, but had given no note for them; that Hair had filed a bill in chancery against him, for the purpose of having the amount coming from the estate of Jenkins to him (Little) settled upon his (Little's) wife; that Hair came to his house, with the bill, to get him to acknowledge service, and said that they would prefer to have the negroes, and to let the money go to pay his debts; that it was agreed that he should keep the negroes until the chancery suit was ended, at which time those not settled on his wife were to be returned to him, and he was to pay the balance due by him on the purchase of the negroes at the sale; that under these circumstances he gave Hair the bill of sale; that the negroes were not produced, no particular price was put on them, and there was no change of possession. He further testifies, that his conveyance to the plaintiffs was made a few days before he left the State, and that they paid him \$800 on the day of sale; and he appends to his deposition, as an exhibit, an obligation executed to him by said Blake Little and Cromwell, on the 31st May, 1848, by which they bound themselves, in consideration of their purchase on the 29th May of all his land, negroes, and other property, to pay outstanding debts against him to the amount of \$35,000.

The plaintiffs then proved that they had paid all the debts specified in this obligation, except two small ones amounting to about \$450, as to the payment of which there was no proof. They then introduced one Hiram Steele as a witness, who testified that, at the time the conveyance to plaintiffs was made, he and one Buffington, since deceased, were overseers for said Blake Little on his two plantations; "that said Little did not tell him he had sold the property he was overseeing, nor that he was going away not to return any more, but told him that he was going to the springs for his health;" that plaintiffs afterwards agreed to pay his wages, and he continued to act as overseer for them; and that he saw two of the negroes now in controversy on the plantation which

Buffington was superintending. "The plaintiffs then asked said witness, whether he had heard said Buffington, while in possession of the property, and after said Blake Little had left, say under whom he was holding the possession of the plantation and slaves over which he was overseer. To this question, and to the answer thereto, the defendants objected; but the court overruled their objection, and allowed the witness to answer; who thereupon stated, that said Buffington said, he was overseer for Gray Little and Patrick S. Cromwell,—that he had had one master, and now he had two'; and to this ruling of the court the defendants excepted."

"The plaintiffs introduced one Tureman as a witness, who proved that, in November, 1848, he was in the employment of the defendant Hair, who was a practicing lawyer; that one Sunday evening in that month, the next day being the first day of the Fall term of the circuit court of Sumter, one of the negroes now sued for came to Hair's house, with a letter informing him that the negroes sued for would be sent to Mississippi the next day by the plaintiffs, to be sold, unless he came up and attended to his own interests; that witness and said Hair started off immediately to the house of Mrs. Little, said Blake's wife, after the negroes sued for; that Hair left directions for a wagon to follow after them, to bring down the negroes; that they got fresh horses at Gainsville, and arrived at Mrs. Little's about midnight; that Hair went into the house, and told Mrs. Little he had come for said negroes; that the negroes were all inside of Mrs. Little's yard, and said Hair, assisted by witness and the defendant Jones, brought them away; that Mrs. Little was living on the plantation on which said Blake resided at the time he left, and is a sister of said Hair's wife; that they took some mules and horses from the stables on the premises occupied by Mrs. Little, and used them in bringing said negroes away, until they met Hair's wagon, when they were sent back; and that they got back to Livingston about 10 o'clock the next day. The plaintiffs then proved the value of the negroes sued for, both at the time they were taken and since, but the proof showed that their value since they were taken was much greater than at that time; and the evidence of their value, at the time of the taking and since, was conflicting."

The defendants, after giving in evidence Hair's bill of sale for the negroes, read the deposition of Mrs. Little, the wife of Blake Little, who testified, that said Blake was indebted to Hair, to the amount of about \$3,300, due January 1, 1847, for property sold by him as administrator of one Jenkins; that the slaves in controversy were sold and conveyed by said Blake to Hair, in her presence, on 26th May, 1848, in payment of this debt; that a fixed price was put upon each; that the sale was absolute and unconditional; that Hair hired the negroes to said Blake, after the sale, and they continued in said Blake's possession; that Blake left the country a few days after the sale; that she was in actual possession of the negroes when Hair took them, and of the premises and stables, which belonged to Dr. Allgood; that the plaintiffs never had possession of either the premises or the slaves. They also offered the deposition of Mrs. Beavers, which corroborated the testimony of Mrs. Little; the deposition of Robert H. Smith, tending to prove the *bona fides* of Hair's purchase; the depositions of Mrs. Buffington and Dr. Allgood, corroborating Mrs. Little's testimony as to the possession of the slaves; evidence showing that the premises, on which the alleged trespass was committed, did not belong to the plaintiffs; evidence showing that Blake Little was insolvent at the time the conveyance to the plaintiffs was executed, that suits were pending and judgments recovered against him, and that he left the State under the pretence that he was going to some springs for his health; and a transcript from the records of the orphans' court, showing that Hair, on final settlement of the estate of Jenkins, was charged with the amount of Blake Little's purchases.

The plaintiffs propounded interrogatories under the statute to Hair, and read his answer to the second interrogatory as rebutting evidence; in which answer Hair states that, at the time of his purchase from Blake Little, he hired the slaves to Little, by a written contract, for the sum of \$10, until the estate of Jenkins should be settled. The defendants read in evidence said Hair's answers to the other interrogatories, in which he stated that he purchased the slaves from Little, and paid him a full and *bona fide* consideration for them.

This is the substance of all the evidence in the cause; and

the bill of exceptions states, that, "among other questions in the cause, were these: first, whether the sale of the negroes by Blake Little to said Hair was fraudulent, either in law or fact; and, secondly, if it was, whether the plaintiffs were subsequent *bona fide* purchasers of the same negroes from said Blake."

"The court charged the jury, among other things,—

"1. That if either party alleged fraud in the conveyance under which the other claimed, the burthen of proving it lay on the party alleging it; but, after that attack was made, and the conveyance impeached, it devolved on the party setting up the conveyance to show that it was *bona fide* and for a fair consideration.

"2. That, ordinarily, if the consideration of a conveyance is proved to be different from or inconsistent with the consideration recited in it, it is a badge of fraud; but that this rule only applies where the consideration proved is less or greater than that recited, and does not apply where a money consideration is expressed, and something else of equal value is proved to have been paid or promised.

"3. That if the jury should find for the plaintiffs on the ground of title, the measure of damages would be the highest value of the slaves at any time between the taking and the trial; that, in addition to this value, they might allow interest thereon, or might look to the value and hire as some guide in coming to a conclusion, but were not bound by them; and that, in addition to the damages thus ascertained, the jury might, if the taking was with circumstances of aggravation, give smart money, or exemplary damages; and playfully remarked, in the way of illustration, 'such as would teach the old gentleman not to violate the Sabbath, nor injure his health by riding in the night, nor interfere with the rights of others.'"

The court also charged the jury, at the request of the plaintiffs,—

"1. That if Hair's purchase on the 26th May was valid, and he then hired the negroes to Blake Little from that time until the estate of said Jenkins should be settled up; and if said Little, before the termination of said hiring, sold them to plaintiffs, and gave them possession,—they became entitled

by the purchase to the possession and service of said negroes until the estate of Jenkins was settled up; and that if Hair, in the meantime, took the negroes from plaintiffs' possession forcibly, or without their consent, he was guilty of a trespass therein, and is liable to plaintiffs to the extent of the value of the services of the negroes for the remainder of the term for which they were hired; and that the jury may, in their discretion, if the taking was with circumstances of aggravation, add smart money to the actual damage."

The defendants excepted to each one of these charges; and they now assign them as error, together with the rulings on the evidence to which exceptions were reserved.

TURNER REAVIS, for the appellants, made these points :

1. To enable the plaintiffs to recover, it was necessary for them to prove that they were purchasers for valuable consideration and in good faith, and that Hair was not; and to do this, it was necessary for them to prove, among other things, the consideration expressed in their conveyance.—Eddins v. Wilson, 1 Ala. 237; Bryant v. Hall, 21 *ib.* 264. The consideration expressed, was an executed, money consideration; while the consideration which the evidence established, was not money, and was executory. The objection to this evidence, therefore, ought to have been sustained; for, when a conveyance is impeached for fraud, by a creditor or purchaser of the grantor, the party claiming under it will not be allowed to prove, in support of it, any other consideration than that expressed.—Murphy v. Br. Bank, 16 Ala. 90; Eckles & Brown v. Carter, 26 *ib.* 563; Sewall v. Baxter, 2 Md. Ch. Decisions, 447; Betts v. Union Bank, 1 Har. & J. 175; Hildreth v. Sands, 2 Johns. Ch. 35; Jones v. Sasser, 2 Dev. & Bat. Law R. 452; 2 Phil. Ev., (C. & H.'s Notes,) p. 369; 4 *ib.* 619, n. 369. The rule recognized by this court in the two cases above cited, and by the courts of Maryland, New York and North Carolina, is in exact conformity with the English decisions, and is founded on good sense, good morals, and public policy; and the facts of this case peculiarly show the necessity for adhering to it, whenever a conveyance is assailed as having been fraudulently made.

The case in 7 Pick. 533, cited by the counsel for the

appellees, is not sustained by any authority. The cases in 3 Watts, 16 Wendell, and 4 Porter, were between the parties to the conveyance, and therefore within the rule adopted in *Eckles & Brown v. Carter, supra*. The case of *Graham v. Lockhart*, 8 Ala. 9, proceeds on the ground that the evidence offered did not vary the quality of the consideration, and is in exact conformity with the general rule.

2. Blake Little was an incompetent witness from interest. He was interested in sustaining the conveyance to the plaintiffs, and their release did not restore his competency.—*Wood v. Braynard*, 9 Pick, 322; *Woods v. Skinner*, 6 Paige, 76, and cases cited on page 81. If the witness spoke the truth, his interest was not balanced; the sale to Hair not being real, but intended to secure a benefit to Little's wife.—*Jones v. Hoskins*, 18 Ala. 489.

3. The declarations of Buffington, although he was in possession of the property, ought not to have been admitted in evidence. The plaintiffs themselves had proved that his possession was acquired as overseer of Blake Little; and the character thus given to it was to be presumed to continue until the contrary is shown.—*Powell v. Knox*, 16 Ala. 370. The contrary could not be shown by his declarations; for the effect of such evidence would be, to prove a contract between him and the plaintiffs, or between them and Blake Little. *Mims v. Sturdevant*, 23 Ala. 664.

4. The first charge given by the court, of its own motion, is erroneous. The plaintiffs were bound to prove, to entitle themselves to a recovery, not only that Hair's purchase was fraudulent in law or in fact, but that they were purchasers for a valuable consideration and in good faith. The burthen of proof was on them, as plaintiffs, not only to impeach Hair's purchase, but to prove the *bona fides* of their own.—*Eddins v. Wilson*, 1 Ala. 237; *Nolen v. Gwyn*, 16 *ib.* 725; *Jewett v. Palmer*, 7 Johns. Ch. 65; *Bryant v. Hall*, 21 Ala. 264; *White & Tudor's Leading Cases in Equity*, vol. 2, part 1, pp. 112-13.

5. The second charge given was erroneous.—*Brackett v. Wait*, 6 Vermont, 411; *Borland v. Walker*, 7 Ala. 269; 11 Sm. & Mar. 469.

6. The third charge given is erroneous for several reasons.
1. Because it did not lay down the measure of actual damage

correctly. The value of the property at the time of the taking, with interest on that value, is the measure of actual damage; and no other damages for the detention or conversion can be given.—2 Greenl. Ev. (3d ed.) § 253; 1 App. (M.) 361; 20 Conn. 211; 4 Blackf. 348; Sedgwick on Measure of Damages, 549. 2. Because it authorized the jury to impose exemplary damages, which were not allowable.—2 Greenl. Ev. (3d ed.) § 253, note 2. If, however, such damages are recoverable as a general rule, there was no evidence in this case which authorized their recovery.—14 Ala. 698; 4 Blackf. 348; Sedgwick on Damages, 549. 3. Because that portion of the charge which related to exemplary damages, was calculated to prejudice the jury against Hair. 4. Because it assumed that Hair had violated the Sabbath, which was a question for the determination of the jury; that Hair was an "old gentleman," when there was no evidence of the fact; that he had injured or would injure his health by riding in the night, when there was no evidence to that effect; and that he had violated the rights of others,—the very question which the jury were to try.—Hollingsworth v. Martin, 23 Ala. 591; Whitsitt v. Slater, *ib.* 626. 5. Because the charge should have been restricted to Hair's liability.

7. The first charge given at the request of the plaintiffs, was erroneous for several reasons, but principally because it asserts that if Little, while holding the slaves under a contract of hiring, sold them to the plaintiffs, and delivered the possession to them, the plaintiffs thereby acquired Little's right to the unexpired term, and that Hair, by taking them without their consent before the expiration of the term, became a trespasser. The sale by Little to the plaintiffs, accompanied by delivery of possession, was a conversion, and a breach of his contract of hiring, and authorized Hair to take peaceable possession wherever he could find them; and since the proof showed that he did take them peaceably, he could not be a trespasser.—Story on Bailments, §§ 396, 413; Sargent v. Gile, 8 N. H. 325; Nelson v. Bondurant, 26 Ala. 341; Sanborn v. Coleman, 6 N. H. 14; Abney v. Kingsland, 10 Ala. 365; Hooks v. Smith, 18 *ib.* 342; Moseley v. Wilkinson, 24 *ib.* 416; Tucker v. Magee, 18 *ib.* 104; Farrant v. Thompson, 16 E. C. L. R. 62; 3 Stark. Ev. 1493. The hiring

of a slave is, in many respects, analogous to a leasing of land; in which case, if the tenant convey in fee, it is a disseizin, which authorizes the landlord to enter, or to bring trespass or ejectment.—3 Peters, 49; 7 Wheat. 107; 1 Johns. Cases, 36, 43; 5 Cowen, 134; 5 Peters, 402.

S. F. HALE, *contra*, contended,—

1. That the evidence of Henry G. Little only showed that the money mentioned in the consideration clause of the deed was not paid in fact, but only agreed to be paid; and that parol evidence is admissible for that purpose, even when the conveyance is impeached for fraud.—Eckles & Brown v. Carter, 26 Ala. 563; Johnson v. Boyles, *ib.* 577; Burbank v. Gould, 15 Maine, 120; McRea v. Parmort, 16 Wend. 460; Bullard v. Briggs, 7 Pick. 533; Johns v. Church, 12 *ib.* 557; Jack v. Dougherty, 3 Watts, 151; Harvey v. Alexander, 1 Rand. 252; Duval v. Bibb, 4 Hen. & Munf. 119; Steele v. Washington, 1 Ohio, 352; Brooks & Brown v. Maltbie, 4 Stew. & P. 105; Phil. Ev. (C. & H.'s Notes,) vol. 4, part 2, p. 619.

2. That Blake Little was made a competent witness for plaintiffs, who were his grantees, by their release.

3. That the declarations of Buffington, who was proved to be dead at the time of the trial, and who was in possession of the negroes when the declarations were made, were competent to show how and under whom he held possession, and were offered for no other purpose.—Mims v. Sturdevant, 23 Ala. 644.

4. That the charges of the court were correct.

CHILTON, C. J.—The law which must govern this case is simple and easy of application. Both parties claim under a purchase from Blake Little,—Hair, by bill of sale, dated 26th May, 1848; and the plaintiffs below, by conveyance, dated the 29th of the same month. Each party insists that the purchase of the other is fraudulent and void. Hair, having the possession, and being the defendant, was entitled to hold the slaves, unless the plaintiffs below could show a right to the property. The plaintiffs in this, as in all cases, to maintain their action, must show a right to recover. Until this is done, the defendant may remain passive. Of course, we

confine our remarks to those cases in which the *onus* is not, by the pleading, cast upon the defendant.

1. The deed to the plaintiffs purports to have been made upon a valuable, a moneyed consideration, in hand paid. It appears that only \$800 in money was paid, and the balance was to be paid in discharge of certain demands due and owing from the grantor. Proof of the undertaking to pay these demands, as a part of the consideration, was objected to by the defendant, but was allowed. This proof was properly admitted. It did not vary the legal effect of the deed, and was not inconsistent with the consideration expressed, which was a *valuable* consideration.—4 Phil. Ev. pp. 619-620, n. 309, ed. 1850.

2. The objection taken to the testimony of Blake Little cannot be sustained. Concede that his interest is not balanced, and that he was interested; yet the defendant should have raised that objection distinctly before he was examined, as he must have been apprised of his interest when the interrogatories propounded to him were crossed.—Hudson v. Crow, 26 Ala. Rep. 515.

3. The declarations of Buffington, which were objected to, were properly received. He was in the actual possession of a portion of the property in controversy; and his declarations tended to explain that possession, and were evidently part of the *res gestae*, and as such admissible.

4. If Jones acted in concert with Hair, and was guilty of the joint trespass complained of, he was guilty to the same extent with Hair; and if the latter did acts which would authorize the jury in giving exemplary damages, Jones, acting in concert with Hair, is liable with him, and to the same extent.—Layman v. Hendrix, 1 Ala. Rep. 212, and cases there cited.

5. We cannot say that there was no proof *at all* tending to show that the jury might not go beyond the actual damage. The question of its sufficiency was not raised in the court below, and is not before us. We are of opinion that the first charge as to smart money was not wholly abstract. The evidence may have been exceedingly weak; but, if there was *any proof tending* to show circumstances of aggravation, it will support the charge.

6. There can be no question, that the party who alleged fraud in the purchase of the other was bound to prove it. The law does not presume fraud,—it must be proved. The respective conveyances are valid upon their face. When impeached for fraud, the *onus* is changed. The party whose deed is thus impeached, must then overcome the evidence of fraud by counter evidence of its fairness.

7. As to the *criteria* of damages given to the jury by the first charge, we see nothing improper. The charge announces the proposition, that the jury may give the highest value of the property at any time between the taking and the trial, and interest thereon, or they might look to the value of the property and hire as some guide in coming to a conclusion, but were not bound by them. The question was, what injury the plaintiffs had sustained by the trespass and the taking away of their property. All the evidence was before the jury; and we think there was no error in saying to them, that the value of the property, as well as of the hire, is *some* guide, though not conclusive, in arriving at a conclusion as to the injury.

8. We decided at the last term that exemplary damages, or "smart money" as it is sometimes called, may be recovered, where the circumstances justify it, in actions of trespass. *Parker v. Mise*, 27 Ala. 480.

9. As to the playful remark of the judge, in illustration of the object of giving exemplary damages, and the measure of such damages, it is only necessary to remark, that, while we are satisfied his honor did not intend to give to the jury any intimation as to what he thought their finding upon the facts should be, yet, it was calculated to impress them with the belief that the judge thought the facts such as would require them to give heavy exemplary damages. It is of the highest importance in the administration of justice, that the court should never invade the province of the jury,—should give them no intimation as to his opinion upon the facts, but should leave them wholly unbiased by any such intimation, to ascertain the facts for themselves. We cannot shut our eyes to the fact, that juries, especially in cases which are strongly litigated upon the facts, watch with anxiety to gather from the court some intimation as to what the judge thinks should

be their finding upon the facts. They do not usually fully comprehend the line of demarkation which separates the duties of the court from those of the jury. It would not readily occur to one, uninstructed in the legal profession, why the judge, who is a sworn officer of the law, impartial as between the parties, sitting upon the trial of the cause, and who hears all the evidence, might not, with much propriety, give his opinion as to the result of the facts. Hence the jury, in the most perfect good faith, are ordinarily inclined to give weight to what they suppose to be the inclination of the mind of the judge upon the facts. But it pertains to the judge to declare the law applicable to the case. He has nothing further to do with the facts, than as furnishing the basis for his charge; while the jury are the triers of the facts under the law as given them in charge by the judge, who, upon contested questions of fact, should sedulously avoid giving the least intimation as to his own opinion. After they have found their verdict, the judge may then act upon his opinion of the facts in awarding a new trial, if he thinks the jury have found wrong. We think the illustration, though playfully given by the court, was well calculated to mislead the jury,—was an invasion of their province, and cannot be supported as a correct application of the rule as respects the question of exemplary damages.

10. The first charge given at the request of the plaintiffs below, cannot be supported. Conceding the validity of Hair's purchase, and of his hiring to Mrs. Little, the subsequent absolute sale was in contravention of the rights of the bailor, contrary to the design of the bailment, and a clear violation of the contract by which Hair agreed that the slaves should be kept by Mrs. Little. The absolute sale to the plaintiffs by Blake Little enabled the purchasers to hold, from that time, adversely to Hair; and if the court was correct in this charge, then, if the hiring had been for seven years, the right of Hair to the property might have been defeated; for, if the purchasers are entitled to hold as having *purchased the term*, under their claim of the *absolute interest*, for a period of more than six years, their title would be perfected by the statute of limitations. Such is not the law. The moment the bailee dis-affirmed the contract of bailment, and sold the

property in derogation of the rights of the bailor,—thus using it in a manner not contemplated by, but in violation of the contract,—the bailor had the right to resume his property, if he could get possession peaceably; and the record in this case shows no evidence that any force was used.—See Stark. Ev., pt. 4, p. 1491; 2 Strob. Eq. 475, note.

For the errors noted, let the judgment be reversed, and the cause remanded.

HARVEY AND WIFE vs. THORPE.

[WRIT OF RIGHT FOR RECOVERY OF LAND.]

1. *Judicial admissions of attorney, conclusiveness of.*—Conceding that attorneys-at-law have power to bind their clients by written admissions as to the facts of a case; yet, where such admissions are made improvidently, or through mistake, the court may relieve against them, by means of its coercive powers over its own officers, and may set them aside upon such terms as will meet the justice of the particular case.
2. *Secondary evidence, different degrees of.*—The rule established by the current of American authorities, which requires a party to produce the best kind of secondary evidence that is in his power, is more reasonable than the English rule, which recognizes no degrees in secondary evidence; but wherever this rule is invoked against a party, he is permitted to show that what appears to be, is not in fact, a higher degree of secondary evidence.
3. *Record copy of deed, conclusiveness of.*—A record copy of a lost deed, or a transcript from the record, which is declared by the statute (Clay's Dig. 155, § 25) to be "as good and effectual and available in law as if the original deed were then and there produced and proved", is only *prima facie* evidence of the contents of the deed, on the ground that all public officers must be presumed to have discharged the duties which the law requires of them; but parol evidence is admissible to show that it was not correctly recorded.
4. *Presumption of conveyance from long-continued possession.*—Where defendant shows a letter from plaintiff's ancestor to an agent, directing him to close a bargain for the sale of the land, a deed thereupon executed by the agent, in his own name, to defendant's vendor, and an uninterrupted possession of twenty-eight years; the court may instruct the jury, that they may presume a conveyance from plaintiff's ancestor, either to the agent, or to his vendee.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

This action was brought by the appellants, Caroline Caldwell, Alexander Harvey and Matilda, his wife, as heirs-at-law of Sebastian Shade, against Andrew Thorpe and Charles Thorpe, "to recover a parcel of land in the city of Mobile, situate to the south of Dauphin street, and bounded thereon, and measuring fifty feet, bounded on the west by the property of George Davis, and extending with the same width one hundred feet"; and was commenced on the 27th October, 1845. The defendants pleaded, in short by consent, the general issue, and the statutes of limitation of ten, twenty, and thirty years.

The trial was had at the May term, 1854; and the bill of exceptions then sealed, at the instance of the plaintiffs, presents all the matters covered by the assignments of error.

The plaintiffs rested their case, after having offered in evidence an agreement, which had been entered into between the attorneys of the respective parties, and which was as follows:

"Harvey & Wife, et al.,

vs.

Thorpe & Thorpe.

} It is admitted in evidence, on the trial of this cause, that Sebastian Shade owned in fee simple,

and was in possession of, the land sued for in this case, until the 20th day of August, 1818; that, on that day, the defendants, and those under whom they claim, went into possession, and have held the same adversely, ever since that time, under claim of title, to this time; that said Shade was the ancestor of the plaintiffs, and that they are his only heirs; that said Shade died, in the State of Alabama, in the year 1820; that plaintiffs were minors at the death of said Shade. It is further admitted, that said heirs married before the termination of their minority; and that the records in the office of the county, of any papers having reference to this cause, may be read in evidence, without objection to the non-production of the originals."

(signed)

"STANLEY, for Pl'ffs."

"LOCKWOOD, for Def'ts."

"The defendants then proposed to give evidence tending

to show that the plaintiffs had no title to the premises sued for; to which the plaintiffs objected, on the ground that they were concluded by said agreement. The defendants then examined Mr. Lockwood, before the court, who testified, that he, as defendants' attorney, entered into said agreement; that it bore his signature, a part of the body of it was in his handwriting, and the other part in Mr. Stanley's; that he, however, had no recollection whatever of the agreement; that, when he entered into it, and until recently, he supposed the plaintiffs were suing for their right lot; that he now believed they were mistaken in that supposition, and, had he known as much when he entered into the agreement, he would not have entered into it. Mr. Lockwood said, also, that he had signed said agreement under an entire misapprehension of the facts as to the titles to the lots, and without consultation with the defendants. Defendants proved, also, that they had given notice to the plaintiffs, several days before the trial, as soon as the error was ascertained, that they would not abide by said agreement as to the right of plaintiffs to the lot in 1818; and produced another (and subsequent) agreement, relating to said cause, as also to the case when it was in chancery, of which the following is a copy :

' Caldwell & others vs. Thorpe, In the Circuit Court.

' Thorpe vs. Caldwell & al., In Chancery.

' In these cases it is agreed, that the records, or the copies from the records, of the circuit or county court, or of the register's office, of the county of Mobile, which either party may wish to use on the trial of said causes, or either of them, may be used in evidence without further proof.'

March 21, '50. (signed) W. C. STANLEY.

' LOCKWOOD & HITCHCOCK, for Thorpe.'

" On the day before the trial, this cause being called, the defendants called the attention of the court to the agreement just above exhibited, and the mistake under which it was entered into; and desired to know, before venturing to trial, whether the court would compel them to abide by the agreement. The court refused to give any opinion, but informed the counsel that he was supposed to know the effect of his agreement, and that the cause must go on to trial. On the trial of the cause, the agreement was read to the jury, subject

to the charge of the court as to its effect, after the evidence was through; the court announcing that, if it should appear that the defendants' counsel entered into the agreement through mistake, and that the plaintiffs' ancestor never was in fact in possession of or owned said lot, he should charge the jury, that the defendants were not bound by the agreement. In Mr. Lockwood's examination as to this agreement, he also said, that he always supposed the lot in controversy was the proper lot called for in the plaintiffs' deed, until the mistake (or supposed mistake) in the copy of the deed to Chamberlain, Smoot and Slade was called to his attention, some short time before the trial now had. The court ruled, that the defendants were not concluded by said first agreement, but that he would hold it good until rebutted, and would allow the defendants to show that the plaintiffs had no title to the premises sued for; to which ruling the plaintiffs excepted.

"It was admitted, that the title to three hundred feet on the south side of Dauphin street in Mobile, beginning on the west at the corner of Royal street, and running east on Dauphin street three hundred feet, and running back south — feet, was in Forbes & Co.; and defendants gave in evidence a record copy of a deed from Forbes & Co. to Wm. H. Robertson, and a record copy of a deed from said Robertson to plaintiffs' ancestor", which are appended as exhibits to the bill of exceptions. The deed of Forbes & Co. to Robertson was dated October 28, 1817, and conveyed lots Nos. 7, 8, and 9, in square No. 1, lying south of Dauphin street, and having a front of twenty-five feet each; and the deed of Robertson to Sebastian Shade, dated January 24, 1818, conveyed said lot No. 9, describing it as follows: "All that piece or parcel of land, situated in the town of Mobile aforesaid, and butted and bounded as follows: lying on the south side of Dauphin street, namely, one lot or parcel of land, being lot No. 9, of square No. 1, of lots and lands sold by James Innerarity, John Forbes and John Innerarity to W. H. Robertson, lying as aforesaid, and butting and bounding on the south side of Dauphin street for the length of twenty-five English feet, on the west southwardly bounded by a lot sold by James Innerarity, John Forbes and John Innerarity to

Col. B. S. Smoot and others, on the south eastwardly by a lot belonging to Col. Louis Judson, and on the east northwardly by lot No. 8 of the said square."

The defendants then offered in evidence a letter from Sebastian Shade to John W. Simonton, and a record copy of a deed from said Simonton to Thomas Shields. The letter from said Shade to Simonton, dated August 20, 1818, was as follows: "Dear Sir: I received your letter of the 17th, containing the proposition of Mr. Shields, which I will accept, provided we understand each other perfectly. The manner the house is to be finished, which you say is agreeable to the original contract, with the following exceptions," &c. "The whole will be finished by me in as short a time as possible. The payments will answer; and if no objection is made (to) the manner I understand the house is to be finished, you will please to close the bargain. I will be in town shortly, and will comply with any agreement pointed out in your letter. Your agreement with Mr. Shields will be conclusive and binding on me. Any trouble you may be at, will be thankfully paid, by your friend," &c. The deed of Simonton to Shields purported to be executed by Simonton as agent of Sebastian Shade, and conveyed to Shields said lot No. 9, describing it as follows: "All that lot or parcel of land, situate, lying and being in the town of Mobile, on the south side of Dauphin street, containing twenty-five feet front on said street, and running back southwardly sixty-one feet, bounded on the north by Dauphin street, east by the lands of James Innerarity, on the west by Smoot and Chamberlain, and on the south by Louis Judson."

The plaintiffs objected to this letter and deed, "on the ground that the letter was no authority to Simonton to convey; but the court overruled the objection, and permitted the evidence to be read,—not as a conveyance, but merely as color of title to show the *bona fides* of the possession had under it; and plaintiffs excepted."

The defendants then offered record copies of a deed from Shields to Batre & Chighizola, for said lots Nos. 7, 8, and 9, dated January 27, 1821; a partition deed between said Batre and Chighizola, by which lot No. 7 was assigned to said Batre, and lots Nos. 8 and 9 to said Chighizola; a deed from

said Batre to Jotham Clark, dated February 15, 1834, conveying said lot No. 7; and a sheriff's deed, dated April 6, 1840, conveying said Clark's interest in said lot to the defendant, Andrew Thorpe. "To each of these deeds, as offered, the plaintiffs objected, because they were the written assertions of strangers, by which plaintiffs were not bound; and because, secondly, they are subsequent to the date of plaintiffs' title. The court overruled the several objections, and permitted the evidence to go to the jury; and plaintiffs excepted." The defendants then offered the record of the judgment against said Jotham Clark, under which said lot was sold by the sheriff. The plaintiffs objected to it on the same grounds; but the court overruled their objection, and they excepted.

The defendants then offered in evidence the deposition of said Simonton, and the plaintiffs raised several objections to it, which, however, it is unnecessary to notice, as the deposition is nowhere copied in the record. They then offered the deposition of H. V. Chamberlain, and the certified copy of a deed appended thereto as an exhibit. Said Chamberlain testified as follows: "Witness, Henry B. Slade and Benj. S. Smoot bought a lot on the south-east corner of Royal and Dauphin streets, at an auction sale by John Forbes & Co. This was in the year 1817, as per copy of deed hereto appended, marked 'A.' My recollection is, that we fronted on Dauphin street one hundred feet. I cannot say whether Robertson bought the east, or not; but he claimed said lot, and built thereon, as the agent of Thomas Shields, as I believe. The south boundary line of the lot was a little less than the front line, in consequence of the way the streets ran. The first lot described in said deed, marked 'A', I think is correctly described therein. In the second lot described in said deed, there has been a mistake made in copying the deed: it should be *twenty-five* feet front on Dauphin street, instead of *seventy-five* feet. The deed hereto annexed, marked 'B,' is, I think, a true copy of the partition deed between the parties therein named; and the property described therein is all the property on Dauphin street purchased by witness, Slade and Smoot at said auction sale. [Cross-examined.] I cannot say, from my recollection, whether the property men-

tioned as lying on the south-east corner of Dauphin and Royal streets, was all offered for sale at one time, or in separate parcels. I cannot recollect how it happened that there were two descriptions in the deed, instead of one. I cannot tell, without a reference to the deed, which of the two lots, one of seventy-five feet, and the other of twenty-five feet, lies farthest easterly. According to the best of my recollection, Addin Lewis had seventy-five feet appropriated to him on Dauphin street; the share appropriated to Toulmin lay between the land owned by witness and Addin Lewis; witness' lay at the corner of Royal and Dauphin, and there was some twenty four or twenty-five feet on Dauphin. The land was divided, I think, by agreement between the parties. I do not remember who were the witnesses to the partition deed, or when the partition was made, or who witnessed the deed from Forbes & Co., or when the said auction sale took place. [*Re-examined.*] The facts are, to the best of my recollection, correctly stated in the partition deed. At the time this partition was made, I had an agreement with Toulmin for my interest in said lot. My recollection of which lot fell to me is imperfect, and I must refer to the deed for positive information as to how much fell to each party. I never, to my recollection, compared the original deeds, of which copies are hereto annexed, with the record book of Mobile county."

The deed from Forbes & Co. to Chamberlain, Smoot and Slade, as appended to the deposition of this witness, is dated October 25, 1817, and conveys the following lands: "One lot, with some old buildings thereon, forming the south-east corner of Royal and Dauphin streets, butting and bounding northwardly on Dauphin street, seventy-five feet, English measure; southwardly on a lot belonging to Louis Judson, sixty-nine feet, or thereabouts; and eastwardly on the lot next mentioned, sixty-seven feet, more or less. One other lot, butting and bounding northwardly on Dauphin street, *seventy-five* feet; westwardly on the foregoing lot, sixty-seven feet; southwardly on Louis Judson's lot, twenty-four feet, or thereabouts; and eastwardly ——— belonging to Wm. H. Robertson, seventy feet, or thereabouts. One other lot, having thirty feet front on Royal street, by one hundred feet in

depth; bounded eastwardly by Royal street; northwardly and westwardly by premises belonging to John Forbes & Co.; and southwardly by a lot belonging to George Fisher." The partition deed between Chamberlain, Toulmin and Lewis, which is dated January 1, 1822, recites that the parties are tenants in common of a certain parcel of land in the city of Mobile, which is described as being "bounded north by Dauphin street, east by lots and lands belonging to J. Chighizola, south by the premises of Louis Judson, and west by Royal street, having a space on said Dauphin street of ninety-nine feet, and sixty-four feet on Royal street"; and which is then divided among in severalty.

"To so much of the deposition of said Chamberlain as tended to contradict the deed thereto appended, the plaintiffs objected, on the ground that the transcript of the record of the deed was, in the absence of the original deed, the best evidence of its contents; and that the deposition of Mr. Chamberlain was not admissible, in a court of law, to contradict the record, or to correct a mistake in the record. The court overruled the objection, and allowed the evidence to go to the jury; and the plaintiffs excepted.

"The defendants read in evidence a written agreement, entered into just before the trial commenced, as follows: That the original deed from Forbes & Co. and Innerarity to Chamberlain, Smoot and Slade was lost, or destroyed, and could not be found; that the defendant, and those under whom he claims, have been in possession of the land sued for since August, 1818, claiming the lot as their own; and that the defendant is now in possession.' They also proved that the premises sued for began one hundred and fifty, and extended to one hundred and seventy-five feet, east from Royal street, on Dauphin, down Dauphin; and contended that the plaintiffs' land, to which they really had a title, began at one hundred, and extended to one hundred and twenty-five feet, down said street from Royal. The main question in the cause was one of location; and whether the lot sued for was the plaintiffs' true locality, depended upon whether Chamberlain, Smoot and Slade's lot extended down Dauphin street one hundred and fifty feet, or only one hundred,—if the former, the plaintiffs have sued for their right land; if the

latter, they have not. The testimony above set out was all the evidence in the cause, except as to rents and improvements; and except that it was in proof, and not contradicted or called in question, that the lot sued for began at one hundred and fifty feet from Royal street, and extended twenty-five feet, fronting on Dauphin as before set forth.

"The court charged the jury, among other things,—

"1. That they were to determine from the evidence before them whether there was a mistake in entering into the agreement first above set out; that if they found it was entered into by mistake, they should not hold defendants bound by it; and that if they found that the plaintiffs had sued for the wrong land, it would be evidence that the agreement had been entered into through mistake.

"2. That the record copy of the deed to Chamberlain is presumed to be correct, and they ought not to hold it to be incorrect, unless satisfied by the evidence that the clerk had made a mistake. And the court remarked, that it felt much difficulty on this part of the case, but did not think it would be justice to permit a party to suffer by a mistake of the clerk."

The plaintiffs excepted to these charges, and asked the court to give the following instructions to the jury :

"1. That, in the absence of the original deed, the record is the highest evidence of its contents, and should be received as superior evidence to the deposition of Mr. Chamberlain on the question ; which charge the court refused, and the plaintiffs excepted.

"2. That the location of the lot sued for is solved by reference to the Chamberlain, Smoot and Slade deed, and for what is covered by it the jury will look to the certified copy of the deed, and not to any other proof offered; which charge the court refused, and the plaintiffs excepted.

"3. That the record, and the transcript of such record certified by the clerk, is to be received by the jury as good and effectual, and available in law, as if the original even (?) were now produced and proved; and that this means, that the jury, in the absence of the original, are to look at the record and transcript thereof, to ascertain the contents of the deed, and are not to look to the deposition of Mr. Chamberlain.

This charge the court refused, and the plaintiffs excepted.

"The plaintiffs then handed the court Clay's Digest, open at page 155, § 25, and asked the court to read that section to the jury, and to tell them that it was a statute of this State, in force as to this trial, and furnished the rule by which the contents of the deed to Chamberlain, Smoot and Slade were to be solved; which the court did, adding, 'provided you are satisfied from the whole evidence that the deed was correctly recorded by the clerk.' To this qualification of the charge the plaintiffs excepted.

The court charged the jury, also, that the deed from Simon-ton, as Shade's agent, was void,—the power being insufficient, and the deed not being in Shade's name.

"The defendants then asked the court to charge the jury, that if they believed from the evidence that Shade sold the lot in suit to Shields, in 1818, placed him in possession, and received the whole purchase money; and that the defendants, and others holding under Shields, have been in quiet possession ever since,—then they might presume that a proper deed was made by Shade, though none was *found* (?). This the court refused, but finally gave the charge, with this qualification, 'provided the evidence did not tend to negative such a presumption'; and to the charge thus given the plaintiffs excepted."

These rulings of the court are now assigned as error.

ROBERT H. SMITH, for the appellants:

1. The main question in the case is as to the location of the premises in controversy; and this depends upon the question, whether a record copy of a deed, the original being lost, is evidence of its contents, or whether the memory of a witness can be admitted against the record; and, if admissible, whether such evidence is of as high character and great weight as the record. The appellants contend that the record is the best and only secondary evidence; and this question seems to be settled by the express words of the statute.—Clay's Digest, 155, § 25; Code, § 1275; Evans v. Bolling, 8 Porter, 546; Hogan v. Smith, 16 Ala. 600; Sturtevant v. Robinson, 18 Pick. 179; Mills v. Barnes, 4 Blackf.

438; *Coman v. State*, *ib.* 243; 1 Green. Ev. §§ 84, 85, and note; 1 Conn. 387.

2. The admissions of Lookwood were binding on his clients. No mistake in entering into it was shown, except by presumption. The court did not make the defendant's absolution from it depend on whether the plaintiffs had been induced to act upon it.—1 Green. Ev. §§ 186, 206; *Starke & Moore v. Kenan*, 11 Ala. 818; *Wetherell v. Bird*, 7 C. & P. 6.

3. The letter from the plaintiffs' ancestor did not authorize a conveyance, and was not evidence conducing to show color of title. It had no other effect than to mislead the jury, by inducing them to connect it with Simonton's deed.

4. The deeds objected to had no relation to, and in no wise affected, the plaintiffs' title, and should have been excluded. The partition deed between Chamberlain and his partners proves that, when that partition was made, they only owned or divided one hundred feet; but it tends to prove nothing as to the original grant.

The defendants claim from Simonton, and not from Shade. They claim adversely to Shade, and, by their assertion of title from Simonton, insist that Shade had no title. How, then, can they ask the court to presume that Shade conveyed to them? To presume a grant in such a case would be a fraud on the statute of limitations. The doctrine of presumed grants only runs against the government; or against some body against whom the statute of limitations does not run.—3 Phil. Ev., pp. 496-8; 4 J. J. Mar. 316, 527.

JNO. T. TAYLOR, *contra*, made the following points:

1. There can be no doubt as to the mistake, shown by the parol evidence, in the recorded copy of Chamberlain's deed, making his lot front one hundred and fifty feet instead of one hundred; but the appellants contend that such evidence could not be introduced to show the contents of the original deed. The answer to this position is, that the record itself is but secondary evidence of the contents of the deed, and that there are no degrees in secondary evidence.—Cowen & Hill's Notes to Phill. Ev., vol. 3, pp. 1211, 1475, notes 221, 254, 295. The statute, on which the appellants rely, only provides one mode of proof, in case of the loss of the original deed, but does not exclude other modes of proof.

2. The defendants do not claim lot No. 7 through the plaintiffs' ancestor, and the question raised on his deed to them does not arise. But, if the record copy was right, and No. 7 was in fact the lot bought by plaintiffs' ancestor, then defendants have been in quiet possession ever since 1818, before the death of Shade; and payment in full being proved, the law will presume that a proper deed was afterwards executed, though none was proved.—1 Greenl. Ev. § 46; Wallace v. Maxwell, 7 Iredell's Law R. 135; Bierce v. Bierce, 15 Ohio, 529; Cowen & Hill's Notes, vol. 1, pp. 498-9.

3. An agent is always a competent witness for or against his principal. If, however, Simonton was interested, he was properly released. The letter attached to the deposition, with the deed to which it related, was only admitted to show the *bona fides* of the defendant's possession. Besides, the power of attorney to make the deed will be presumed.—6 Martin's La. R. 153; 1 Greenl. Ev. § 21; O. & H.'s Notes, p. 365, n. 311.

4. The deeds objected to were entirely relevant, and each was a link in the chain of title.

5. The agreement introduced by the plaintiffs was entered into only for a previous trial, and was waived by the subsequent agreement. It was, moreover, made through mistake, produced by the false record.—Dorsey v. Gassaway, 2 Har. & J. 402; 1 Greenl. Ev. §§ 27, 206.

GOLDTHWAITE, C. J.—As to the action of the court in allowing the defendants to introduce evidence in opposition to their agreement in writing, we see no error. Conceding, so far as the present case is concerned, that attorneys may bind their clients by such admissions as were here made, it is only necessary to observe, that where they are made improvidently and by mistake, the court, by means of its coercive powers over its own officers, has authority to relieve against the consequences of the admission; regulating its action in this respect with a just regard to the rights of both parties, which it can do by setting aside the agreement upon terms which will meet the justice of the particular case.—1 Greenl. Ev. § 206. The evidence submitted to the court brought the question within the principle we have laid down;

and the authority, to the extent it was exercised, was judicious.

As to the principal question in the case—the admission of parol evidence to contradict the transcript of the deed certified by the clerk: The English cases certainly lay down the rule very broadly, that there are no degrees in secondary evidence (*Rowlandson v. Wainright*, 1 Nev. & Per. 8; *Coyle v. Cole*, 6 Car. & P. 81; *Rex v. Hunt*, 3 B. & Ald. 506; *Brown v. Woodman*, 6 Car. & P. 206); while, on the contrary, the current of American authorities goes very strongly to show that, although the facts may warrant the admission of secondary evidence, the best kind of that character of evidence which appears to be in the power of the party to produce, must be offered.—*U. States v. Britton*, 2 Mass. 464; *Kello v. Maget*, 1 Dev. & Batt. 414; *Renner v. The Bank of Columbia*, 9 Wheat. 582-597; *Den v. McAlister*, 2 Hals. 46-53; *Blade v. Nolan*, 12 Wend. 173. We confess that the American rule appears to us more reasonable than the English; and we see great propriety, if there was an examined copy of an instrument in the possession of a party, in refusing to allow him to prove it by the uncertain memory of witnesses. A copy of a letter, taken by a copying press, would unquestionably be better evidence of the original than the recollection of its contents by a witness; and the same reasons which would require the production of the original, if in the control of the party, would operate in favor of the production of the fac-simile, or of the examined copy. But, in all these cases, the strength of the proposition consists in the fact, that there is secondary evidence, in its nature and character better than that which the party offers, and that it is in his power to produce it. He certainly must be allowed to show, that what appears to be secondary evidence of a higher degree is not so in fact. In other words, he would be allowed to show that the paper, which purported to be a copy, was not in fact and in truth one.

To apply these principles to the case under consideration, the question is, whether the defendants below were concluded by the record of the conveyance in the office of the clerk of the county court. We should think it very unreasonable, that because the law authorized the conveyance to

be recorded, that record should, in case of the loss or destruction of the original, be conclusive even on the parties to the deed. It would be more unreasonable still to give this effect to it against a stranger. That the legislature has the power to do so, is not denied; but we should require the use of the clearest and most unequivocal words to force us to such a conclusion.

The act of 1803 requires the clerk of the county court to record all conveyances of land lying in his county, duly certified and acknowledged, which are delivered to him for that purpose (Clay's Digest, 154-155); and the thirteenth section provides, that, in case of the loss or destruction of the original deed, the record, or a duly certified transcript, shall be received in evidence, "and be as good and effectual and available in law as if the original deed or conveyance had been produced and proved." In giving to the record the same degree of force that the original deed would have had, it was doubtless presumed that the clerk would make a true copy, "word for word," as another section of the act requires him to do; and we think it was only the record when thus made that it was intended to invest with unimpeachable verity. In other words, to make it a record, it must be a copy. Even judicial records, made under the sanction of judicial officers, and in themselves originals, have not always been held conclusive as to jurisdictional facts. Here the act contemplates nothing but a copy; and it is to this copy, when made by the clerk, that it was the intention of the law to accord unimpeachable verity. It is *prima facie* evidence, on the ground that all officers must be presumed to have discharged the duties which the law requires of them; and the statute also dispenses with any further proof of the execution than the production of the record or the transcript. But we are satisfied that it could never have been intended to make the record as effectual as the original, unless it was a true copy; and we must, therefore, hold that it is not conclusive.

As to the relevancy of the deed made by Simonton, as the agent of Shade, to Shields, and the letter to Simonton: It is clear that the letter conferred no authority on the latter to make the deed; and if it had, the conveyance as made was his act, and not the deed of Shade. It is to be remembered,

however, that the main question in the case was the location of the premises. The lot sued for commenced one hundred and seventy-five feet east from Royal street; and if the jury should come to the conclusion that there was no mistake in recording the deed from Forbes & Co., to Chamberlain, Smoot and Slade, then the deed from Robertson to Shade would include the premises sued for; and it was to resist the right of the plaintiffs in that aspect, that we understand the deed was offered. It was admitted that the defendants had been in possession since August, 1818; and if their possession was to be referred to this deed, then the question would be, whether the jury might not presume what was necessary to make that deed effectual. Upon authority, the rule is, that where a party has proved a title to the beneficial ownership, and a long possession consistent therewith, courts will leave it to the jury to say whether a conveyance should not be presumed.—Green. Ev. § 46; Cow. & Hill's Notes to Ph. Ev. vol. 5, p. 267. A strong case would be, where a party held possession for more than twenty years under a bond for titles, having paid the purchase money. Here, a proposition is made by the owner of a lot to his agent, directing him to close the bargain for a sale; which is apparently done, and the purchase money paid to the agent. In such a case, after twenty-eight years uninterrupted possession, the rule we have adverted to might well have warranted the court in submitting it to the jury to presume a deed from Shade to Simonton, to support the conveyance which the latter had made; or they might, upon the same state of facts, presume that a deed was made directly to Shields. We see no error in the ruling of the court in this respect, or in the charge given in relation to the same question.

Neither do we regard the admission of the other deeds as erroneous. By the decision of the court upon the agreement made by the counsel, it became necessary for the appellees to show that the plaintiffs had no title to the premises sued for; and it was also necessary to make this proof, in both aspects in which the case presented itself. If the deed from Forbes & Co. to Chamberlain, Smoot and Slade called for one hundred and fifty feet on Dauphin street, then it would be necessary to show that the plaintiffs had no title to lot number

Clark et al. v. Gilmer.

nine; while, if it called for but one hundred feet, it would be necessary to show the same fact as to lot number seven. We have already seen that the deed from Simonton to Shields was admissible; and every other deed introduced tended to show that the title to lot number seven was not in the demandants.

Judgment affirmed.

CLARK ET AL. vs. GILMER.

[BILL IN EQUITY FOR REDEMPTION UNDER ALLEGED MORTGAGE.]

1. *How non-resident infant defendants may be made parties.*—Non-resident infant defendants, whose father is dead, and whose mother is a non-resident, may be made parties to a bill by publication and sending a copy of the order to their mother, with whom they live, at her known place of residence; but sending a copy of the order to *Elizabeth Lewis*, "as the mother of said infants," when their mother's name is shown by the record to be *Mary A. Lewis*, is not a compliance with the rule.
2. *Decree reversed for error prejudicial to infant defendants.*—When non-resident infant defendants are not properly brought in as parties, the decree will be reversed by the appellate court, and the cause remanded, although the error escaped the notice of the solicitors and chancellor in the court below, and was not specially assigned as error.

APPEAL from the Chancery Court of Cherokee.

Heard before the Hon. A. J. WALKER.

This bill was filed by William Gilmer against the administrator and heirs-at-law of James W. Lewis, deceased. The only point here decided renders it unnecessary to state the facts.

JAMES B. MARTIN, for the appellants.

D. W. BAINE, *contra*.

RICE, J.—Where non-resident infants are named in a bill as defendants, and their father is dead, but their mother is

alive, and her place of residence known to the complainant, they may be made defendants by publication, and sending a copy of the order to their mother. It is irregular to appoint a guardian *ad litem* for them, or to render a decree against them, before they are brought into court by such publication and sending.—Rules, 4, 40, 41; Walker v. The Bank of Mobile, 6 Ala. R. 452; Hodges v. Wise, 16 Ala. R. 509; Erwin v. Ferguson, 5 Ala. R. 167.

In the present case, five of the persons named in the bill as defendants, are non-resident infants, whose father is dead, and whose mother lives in the same place where they live. Her name is Mary A. Lewis. There is no proof that a copy of the order of publication ever was sent to her, or that she was ever known by the name of Elizabeth Lewis. But a copy of it was sent to Elizabeth Lewis, “as the mother of said infants.” Sending the copy to Elizabeth Lewis, “as the mother of said infants”, was not sending it to Mary A. Lewis, who is in fact their mother, nor equivalent thereto, (20 Pick. Rep. 439; 2 Eng. (Ark.) Rep. 395); and therefore did not authorize the appointment of a guardian *ad litem* for them. And this appointment being irregular, the subsequent proceedings and decree, by which these infants are divested of title to the land in controversy, cannot be sustained.

As the effect of this decision will be, to require of the complainant a proper publication and sending of the order, as well as the taking of his testimony anew, so far as the infants are concerned, it is unnecessary, and perhaps improper, to express our opinion upon the merits of the case as disclosed by the testimony set forth in this record. The infant defendants cannot be concluded by this testimony; and we cannot know that the testimony hereafter to be procured, and upon which their rights must be determined, will be substantially the same as that now presented to us. As between them and the complainant, we leave the case as open as it was before any order was made in it.

The decree of the chancellor is reversed, and the cause remanded. The appellee must pay the costs of this court.

It is proper to say, that the error for which the decree is reversed, is one which escaped the notice of the solicitors and the chancellor, and was not even noticed by the counsel on

the argument in this court. But, as it is an error to the prejudice of infants, and we see it on the record, and the assignment of errors is broad enough to embrace it, we cannot pass it over, nor allow the decree to stand.—*Sanford v. Granger*, 12 Barb. Sup. Ct. Rep. 392.

HAIR, ADM'R, &C., ET AL., vs. AVERY ET AL.

[BILL IN EQUITY FOR DIVISION AND ACCOUNT OF SLAVES, BY CHILDREN CLAIMING UNDER WILL OF MATERNAL GRANDFATHER, AGAINST PURCHASER AT EXECUTION SALE AGAINST THEIR FATHER.]

1. *As to misjoinder of complainants, and waiver of rights by joining in bill.*—Where an administrator and the surviving sister of his intestate, as tenants in common, join in a bill for the recovery of slaves bequeathed by the maternal grandfather of the sisters to their mother and her children, and sold under execution against their father, the surviving sister thereby waives her right of survivorship, if any she had; and the defendant cannot raise the objection, that the will created a joint tenancy, and that therefore there was a misjoinder of complainants.
2. *Wife's right of survivorship.*—The husband's marital rights do not attach, so as to defeat the wife's right of survivorship, to property which is in the actual and rightful possession of another, and of which he cannot obtain possession during the coverture without becoming a trespasser.

APPEAL from the Chancery Court of Greene.

Heard before the Hon. JAMES B. CLARK.

This bill was filed by James Hair, as administrator of Mildred Walker, deceased, and Etherlin T. Croxton, against Bryant Avery and Pinckney Jones, and alleged the following facts: That John Hill, the maternal grandfather of said Mildred and Etherlin, died, in 1821, in King William county, Virginia, after having made and published his last will and testament, which was duly admitted to probate after his death, and which contained the following residuary clause: "And, lastly, my desire is, that all the residue of my property, except a woman named Patty, be equally divided, after the

payment of all my just debts, between my son Robert, my daughter Polly's children, my *daughter Mildred and children*, and my daughter Sarah."

The bill further alleged, that the said Mildred, named in said will, was the wife of one Baylor Walker, and the mother of said Mildred Walker and Etherlin T. Croxton, who were her only children living at the death of said John Hill; that the residue of said Hill's estate, after the payment of all his debts and specific and general legacies, consisted of a large number of valuable family slaves, which were shortly afterwards divided among the residuary legatees according to the provisions of the will; "that said Baylor Walker received, and took into his possession, the share or portion which was allotted and coming to said Mildred and her children; that this share consisted in part of several valuable family slaves, which remained in the possession of said Baylor, in Virginia, until about the year 1837, when he removed to the county of Sumter, in this State, bringing said slaves with him"; that said Baylor Walker, soon after removing to this State, became involved in debt, and judgments were rendered against him; that executions were issued on these judgments, and levied on some of the said slaves, whose names are specified; that these slaves were sold under said executions, and were purchased by the defendant Bryant Avery, who has since conveyed one or more of them to his co-defendant, Jones.

The bill also alleged, that said Mildred and Etherlin were infants at the time their father removed with said negroes from the State of Virginia; that said Etherlin intermarried with Croxton in 1838, in Virginia, and continued to reside there with him until his death, which occurred in 1848; "that said Croxton never made any effort to recover said slaves, and never reduced the interest of said Etherlin into possession"; that said Mildred has departed this life, and said Hair has been appointed her administratrix; that Baylor Walker died in 1844, and his estate being wholly insolvent, no administration has ever been had upon it; "and complainants now charge and aver, that the rights of the said Mildred and Etherlin, who were the only children of said Milly Walker, attached to the said slaves, and became vested in

them as such children, jointly and equally with their said mother, at the death of the said John Hill, and that they are still entitled to recover their proportionate part of said slaves, their increase and hire." The prayer of the bill is, "that an account may be taken of the value, increase, and hire of said slaves; and that said slaves, with their increase and hire, may be divided upon such just, fair, and equitable terms as may seem right and proper."

The chancellor dismissed the bill for want of equity, but without prejudice to the right to file another; and his decree is now assigned for error.

TURNER REAVIS, for the appellants, made these points :

1. The bequest to Mrs. Walker and her children created a tenancy in common, and not a joint tenancy.—2 Bla. Com. 320; Amb. 656; 2 Atk. 122; 3 Vesey, 628. The averment in the bill, that Etherlin and Mildred were "jointly and equally" interested in the bequest with their mother, is to be construed in reference to the will, which is made an exhibit, and cannot amount to an allegation of a joint tenancy, unless the will creates that estate. If, then, the children of Mrs. Walker took an estate in common with her, there was no right of survivorship, and, consequently, no misjoinder of complainants; for tenants in common may join, or the personal representative of the deceased may join with the survivor.—Story's Equity Pleadings, §§ 159, 358, 622, 830; Patton v. Crow, 26 Ala. 426.

2. But, if the bequest created a joint tenancy, the statute of Virginia, in which State the will was made, converts joint tenancies into tenancies in common.—Revised Code of 1819, 359, § 2; Revised Code of 1849, 502, § 18; 1 Tucker's Com. 173. It is true this court has repeatedly held, that the common law will be presumed to prevail in other States of the Union, until the contrary is shown. Can it not be shown in this court, in the first instance, by the production of the properly authenticated statutes? It seems to have been done in a case reported in 2 Stew. & P. 91, and to be allowed by the statute (Clay's Digest, p. 341, §§ 154, 159; Code, §§ 2293, 2296); and such is the practice of some other courts. 12 Vermont, 396; 3 Barb. 20; 2 McLean, 579, 168; 9 Peters,

607. Will the court presume a fact which every body knows to be false? Will it presume that the common law prevails in Louisiana, when the public history of the country proves that it does not? Is not the court bound to take notice of the public history of the country? and is not a general public statute of another State, especially when it changes a long established rule of the common law, a matter of public history?

3. But, if the bequest creates a joint tenancy, and the common law is presumed to prevail in Virginia; still the bill shows that the joint tenancy was destroyed, and converted into an estate in common. There being nothing in the bequest to prevent the marital rights of Baylor Walker from attaching to his wife's interest in the slaves, he became a joint tenant with his two daughters, so soon as he received the slaves into his possession.—2 Ala. 152. The subsequent sale of the slaves, under execution against him, and the delivery of possession to the purchaser, dissolved the joint tenancy, and converted it into a tenancy in common; for there can be no unity of possession, where there is an adverse holding.—2 Bla. Com. 151; *Thompson v. Mawhinney*, 17 Ala. 368-9.

4. If, however, the joint tenancy was not thus severed, it was severed by the statute of this State, on the death of Mildred.—*Clay's Digest*, 169, § 6. This statute is a law of distribution, and distribution is made according to the law of the intestate's domicile. The bill shows that Baylor Walker had been a resident of Alabama for five years, when the slaves were sold under execution against him, and therefore had his domicile here; and Mildred being an infant, her father's domicile became hers.—*Story on Conflict of Laws*, §§ 46, 376, 481 a; *Phillimore on Domicile*, 31, 35, 39; 2 *Kent's Com.* 226, note c; *Pottinger v. Wightman*, 3 Mer. 67; 5 *Pick.* 20; 10 Ala. 946.

So then, whether the will creates a tenancy in common or a joint tenancy, the administrator of Mildred properly joined in the bill with Etherlin.

5. If, however, there is a misjoinder of complainants, and either shows a title to relief, the bill should not have been dismissed, but leave should have been granted to amend.—

Story's Equity Pleadings, § 541, note 4, and § 544, note 3; Clay's Digest, 351, § 37; 24 Ala. 149; 10 *ib.* 702; and cases cited in Reavis' Digest, 299, § 929.

ORMOND & NICOLSON, and E. W. PECK, *contra*:

1. The bequest to "Mildred and children" created a joint tenancy in Mrs. Walker and her two daughters, at common law; and the court will presume, in the absence of an averment to the contrary, that the common law prevails in Virginia, where the bequest was made. The sale of the slaves, under execution against Baylor Walker, did not destroy the joint tenancy so far as Mildred and Etherlin were concerned. 2 Bla. Com. 186; 2 Ad. & El. 75; 5 Nev. & M. 372.

2. The bill shows no title in Hair, for it does not allege that his intestate died in Sumter county, nor that the property was there when his letters were granted.—Clay's Digest, 301, § 22; 1 Dan. Ch. Pr. 360; Story's Equity Pleadings, § 23. As the bill nowhere alleges that said intestate ever came to this State, the question of domicile does not arise.

3. The marital rights of Croxton attached to his wife's interest in the slaves, and therefore complainant Etherlin shows no title to recover.—Magee v. Toland, 8 Porter, 36.

4. There was a complete remedy at law.

5. The bill was properly dismissed for the misjoinder.—Story's Eq. Pleadings, § 232; 4 English Ch. 225; 22 Ala. 655.

CHILTON, C. J.—When this case was first argued, I felt satisfied that there was a misjoinder of parties complainant, in this, that the administrator of Mildred, who was dead, was joined with Etherlin, the survivor; and that this misjoinder was fatal to the complainants' case. I have subsequently looked more carefully into the authorities, and upon more mature reflection, I am satisfied that my first impressions were erroneous.

The argument to sustain the demurrer for misjoinder, is based upon the idea, that the will of the testator, bequeathing the property to his daughter Mildred and her two children, Mildred and Etherlin, created in the three a joint tenancy by the common law, to which the right of survivorship attached; and, since the will was made and took effect in the State of

Virginia; and no statute of that State was alleged, changing the common law, the latter must be regarded by us as of force, and the will should be construed accordingly. Hence it is urged that, upon the death of Mildred, her mother's interest having been separated by a sale of the property under execution against her husband, the interest of Mildred survived to Etherlin, and therefore, the administrator of Mildred had no interest and was improperly joined as complainant with Etherlin.

The complainants make their title to the slaves through a bequest of Mr. Hill, their maternal grandfather. Whether the language of the will creates a *joint* interest in the property, or the parties hold as tenants in common, is matter of construction. In the settlement of this question, the defendants have a right to have all the parties before the court, who are interested in its decision. It is very clear, then, that Hair, the administrator of Mildred, the younger, might properly have been made a party defendant, conceding that it should turn out the right of survivorship existed in Etherlin. But he is made a co-complainant; and the bill proceeds upon the allegation, that each of the complainants has an equal share in the property secured to them by the bequest. Does it lie in the mouth of the defendants to say, 'no, it is a mistake; the property, upon a proper construction of the language of the bequest, upon the death of Mildred, survived to Etherlin, and she alone is entitled to sue for and recover it'? What interest have the defendants in the question, whether the right of survivorship obtains or not? None whatever. So that they are protected, and the record is made to furnish a complete estoppel as to all parties in interest, against any subsequent effort to make the defendants liable upon the same title, it is all they have a right to demand.

The demurrer concedes the truth of the facts stated in the bill. The complainants allege that they are "jointly and equally interested" in the property sued for,—that such is the effect of the bequest upon which they rely for title. Whether this be true or not, depends upon the law existing at the time the bequest took effect in Virginia. The foreign law is matter of proof. *Non constat*, they may show a statute of Virginia abolishing the right of survivorship as an

incident to joint tenancies. But, be this as it may, Etherlin, by uniting with Mildred's administrator in a bill to recover each their one-third interest in the property, waives her claim by right of survivorship, if she have any, and concedes to her sister's estate an equal participation in the property; thus effectually barring and estopping herself from ever after demanding the interest which the bill claims for the estate of Mildred. We are of opinion, therefore, that there is not a misjoinder of complainants in this aspect of the case; at least in such sense as to be fatal to the bill.—See, as to plaintiffs' right of waiver, Story's Eq. Pl. § 224; and upon the insufficiency of the objection to defeat the bill, Rhodes v. Warburton, 6 Sim. Rep. 617; Story's Eq. Pl., note 1 to § 510, p. 542, ed. 1852; Aylwin v. Bray, 2 Younge & Jer. 518, note; Story's Eq. Pl. § 544, note 2; *ib.* p. 573, n. 1, and cases there cited. See, also, 2 Younge & Jer. 520; 1 Keen's R. 601-619; 2 Younge & Coll. 132; Edwards on Parties, p. 8, and cases cited by this author.

2. Another objection is taken, that Croxton's administrator is the proper party to recover the interest which vested in Etherlin, his wife. But this cannot be maintained. He never reduced the property into possession as husband. It had never been divided, so as to separate the share which belonged to his wife; and being in the actual possession of another, not as a mere *depositum*,—not held by him as the simple bailee of Croxton, his marital rights never attached; and the wife, surviving him, is entitled to recover. We had occasion to examine this question somewhat in Mason and Wife v. McNeil's Executors, 23 Ala. Rep. 201, and need not here repeat what we there said. A mere constructive possession, such as the law draws to the title, will not suffice to vest a complete title in the husband, where it is in the actual and rightful possession of another.—27 Ala. Rep. 129-130; 23 *ib.* 201, and cases cited. Mr. Bell, in his work on Husband and Wife, pages 49-50, says, "Marriage is an *absolute* gift of all personal estate, which is either *actually* in the possession of the wife at the time of the celebration of the marriage, or which comes into *actual* possession during the continuance of the coverture." Mr. Bright limits the husband's marital rights to such personal estate as the wife was

"*actually* and beneficially possessed of at the time of the marriage, in her own right, and such as come to her during the marriage,"—Bright's *Hus. and Wife*, vol. 1, p. 34. See, also, Coke's *Lit.* 351.

I think it may safely be asserted as a correct rule, that the husband's marital right does not attach, so as to defeat the wife's right by survivorship, to property so situated that neither the husband nor wife has actual possession, and of which they could not obtain possession during the coverture, without becoming trespassers. In other words, where the actual possession, and the right to such possession, are in another, and so remains during the coverture, the property survives to the wife.—See *Williams on Pers. Property*, pp. 7, 21, 25, 26.

It results from what we have said, that the decree of the chancellor dismissing the bill was erroneous. Let it be reversed, and the cause be remanded for further proceedings.

DANFORTH vs. LANEY.

[BILL IN EQUITY FOR SPECIFIC PERFORMANCE OF PAROL CONTRACT.]

1. *What part performance avoids statute of frauds.*—Possession by the vendee, with the consent of the vendor, under a parol contract for the sale of land, takes the case out of the statute of frauds; but mere possession, when it is not shown to be under the contract, is not sufficient.
2. *Burthen of proof as to character of possession.*—Where the bill alleges possession under the parol contract of sale, and the answer admits the possession, but alleges that it was acquired and held under a contract of rent, and denies the alleged contract of sale, the burthen of proof is on the complainant to prove the character of the possession.

APPEAL from the Chancery Court of Barbour.

Heard before the Hon. WADE KEYES.

This bill was filed by David Danforth, the appellant, against Charles D. Laney, to enforce the specific performance of an alleged parol contract for the purchase of a tract of land. It

alleged that the contract was made on the 14th March, 1850; that complainant executed his note for the purchase money, and defendant promised to make him a good and sufficient title when the purchase money was paid; that complainant entered into the possession of the land under said contract, with the consent of the defendant, repaired the fences, and cultivated and improved the land for the year 1850; that he afterwards sold a portion of the land to one Copeland, executed to him a bond for title, and placed him in possession; that, when his note for the purchase money became due, he tendered the amount to said Laney, and demanded a conveyance of the land; and that Laney refused to accept the money and to execute the conveyance. It further alleged that, by reason of Laney's failure to comply with his contract, complainant became unable to make titles to Copeland, according to the condition of his said bond for title; and that said Copeland afterwards brought suit on said bond, and recovered a judgment against complainant for a large amount. A tender of the purchase money is made in the bill, and the prayer is for a specific performance of the parol contract, or, if defendant cannot make titles to the land, for compensation in damages.

The defendant answered the bill, denying that he had ever made the alleged contract of sale, or that complainant had entered into the possession of the land under such contract; and alleging, on the other hand, that he agreed to sell said land to complainant, if he should find, upon examination and consultation with the other parties who were equally interested in the land, that he could make good titles; that he afterwards found out that he could not make perfect titles to the land, because he could not procure the legal assent of some minor heirs who were interested in it, and informed complainant of that fact; that complainant, at the time this agreement was made, was in possession of the land as a tenant, under a contract of renting which bound him to repair the fences; and that all the repairs and improvements ever made by him were made under said contract. The answer admits that complainant, at the time of the said agreement for the sale of said land, executed the promissory note appended as an exhibit to the bill, and left it on respond-

ent's desk; but respondent denies that it was executed under said agreement, or was required by him, or was regarded by him as a demand against complainant. The answer also sets up the statute of fraud as a defence to the bill.

The testimony, in substance, is as follows: Edward B. Young testifies, "that he heard Laney say that he had sold the land to Danforth, and that Danforth was making a speculation on it." Copeland testifies, "that he had a conversation with Laney, in the fall of 1850, having understood that there was some difficulty in Laney's making titles to the land; that when he asked Laney about it, Laney replied, that when he sold the land to Danforth he thought he could make a good title to it, and that he felt morally bound to make Danforth titles to the land." L. C. Gaston testifies, "that he heard Laney say that he had sold the land to Danforth, but that he afterwards discovered he could not make titles in consequence of their being minor heirs; that when Danforth tendered Laney the money on the note, Laney refused to take it, and offered the note back." J. Cameron "heard Laney, in 1849 or 1850, speak about the sale of said land, but did not hear him say that he had sold it to Danforth." E. Parton testifies, that he was present when Danforth tendered Laney the money due on the note and demanded a deed; that Laney offered to make such titles as he could, but refused to make a deed with warranty.

On final hearing, on bill, answer, and proof, the chancellor dismissed the bill; and his decree is now assigned as error.

JAMES L. PUGH, for the appellant:

1. If a parol contract of sale has been partly performed, and a refusal to execute it would work a fraud on the vendee, specific performance will be decreed.—*Brewer & Brewer v. Logan*, 19 Ala. 488; *Morphett v. Jones*, 1 Swanst. 172; *Buckmaster v. Harrop*, 13 Vesey, 473; 1 *Vernon*, 159, note 2; 2 *Story's Equity*, § 761. Possession alone is such part performance as will take a case out of the statute.—19 Ala. 488; *Lacon v. Martin*, 3 Atk. 1; *Butcher v. Butcher*, 1 *Vernon*, 364; 2 *Ball & Beatty*, 174; 1 *ib.* 127; 2 *Story's Equity*, § 761.

2. The law will refer the appellant's possession of the land

to the parol contract of purchase.—18 Vesey, 332; 13 *ib.* 474; 1 Ball & Beatty, 127; 2 Story's Equity, § 763. The averment of the answer, that appellant holds as tenant, is matter in avoidance, and must be proved; but the answer is wholly unsupported by any evidence of that fact. The fact of possession is not denied, but the issue is as to the character of that possession. The purchase is proved; and the possession will be referred to that purchase, unless affirmatively shown to belong to the alleged contract of rent.

3. The taking of the note, and the parol sale, material facts within the defendant's knowledge, are denied by the answer, but are proved; and the answer therefore loses its weight as evidence.—20 Ala. 662; 21 *ib.* 633.

4. When a specific performance cannot be decreed, and the party is without remedy at law, compensation in damages will be given.—2 Story's Equity, § 798, note 1; Woodcock v. Bennett, 1 Cowen, 755; Pratt v. Law, 9 Cranch, 492; 4 Ves. 497; 1 P. Wms. 570; Anthony v. Leftwich, 3 Rand. 238.

E. C. BULLOCK, *contra*, contended,—

1. That a party who seeks to take a parol contract out of the statute of frauds, on the ground of part performance, must make out the existence of the alleged contract by clear and satisfactory proof, and the act of part performance must be of the identical contract set up by him. It is not sufficient that the act is evidence of some agreement, but it must be unequivocal and satisfactory evidence of the identical contract alleged in the bill.—1 Maryland Chancery Decisions, 345; Phillips v. Thompson, 1 Johns. Ch. 131; Parkhurst v. Van Cortland, *ib.* 273; 2 Story's Equity, § 764; 3 Kent's Com. 451; Hood v. Bowman, Freeman's Ch. 290; Wood v. Farmer, 10 Watts, 195; 1 Watts & Serg. 383; 2 Dess. 290.

2. The allegation of the bill is not of possession merely; for that alone, unless it was under the contract of sale, would avail nothing. Possession under the contract is alleged, and is expressly denied by the answer. The answer is strictly responsive, and must be disproved. When delivery of possession is relied on to take a case out of the statute, it must be referable only to the contract alleged in the bill, and not to a distinct and different title.—Owings v. Baldwin, 1

Maryland Chancery Decisions, 120; *Small v. Owen*, *ib.* 363; 11 Gill & J. 314; 2 Sch. & Lef. 3-7; 3 Watts & Serg. 63; 7 Barr, 91; Freeman's Ch. 290; 10 Watts, 195; 19 Conn. 64; 9 Miss. 566; 4 Cranch, 238; 4 Ired. 125; 1 Dev. Eq. 341; 13 Sm. & Mar. 93.

GOLDTHWAITE, C. J.—Regarding the contract for the sale of the land as fully proved, the only question is, whether such a part performance has been shown as will take it out of the statute of frauds. The rule is, that the act must be such as could be done with no other view than that of the agreement being performed, (*Sugden on Vendors*, 72); and hence, if possession by the vendee, under the contract, with the consent of the vendor, is shown, it is sufficient. The bill charges that such was the case. The defendant in his answer denies this charge, and then proceeds to state that the complainant was in possession under a contract of rent. No evidence whatever is offered by the complainant, as to his possession; but it is insisted, that the possession being admitted by the answer, the absence of evidence showing the contrary refers such possession to the contract. We agree, that, where one who is out of possession makes a parol purchase, and immediately afterwards enters, under such circumstances as to create a reasonable presumption that the entry was made with the consent of, or acquiesced in by, the vendor, it then falls directly within the principle to which we have adverted. But we have found no case which goes so far as to hold that the mere possession of the land, without any further proof, will refer itself to the contract; on the contrary, the cases hold a different doctrine, and assert that it must appear that he took possession with the assent of the vendor.—*Lord v. Underdunk*, 1 Sand. Ch. 46; *Lewis v. Smith*, 1 Hoff. Ch. 470. It must appear that it could only have been done with reference to the contract.—*Ellis v. Ellis*, 1 Dey. Ch. 180; *Anderson v. Chick*, 1 Bail. 118; *Hood v. Bowman*, Freeman's Ch. 290; *Aitken v. Young*, 12 Penn. State R. 15; *Owings v. Baldwin*, 1 Md. Ch. Dec. 120.

Under the influence of these authorities, if it were conceded that the answer virtually admitted the possession of the complainant, but denied that such possession was referable to the

contract charged, further proof would be required. This is not the case of a confession and avoidance. The charge is, that possession was taken under the contract, with the consent of the vendor. The answer expressly denies this, and refers the possession to another contract; and until some evidence is offered, which connects the possession with the contract which the bill charges, the vendor is not called upon to show that it was under a different agreement.—Bright v. Haggin, Hard. 536.

The decree below is affirmed.

PRICE & SIMPSON vs. GILLESPIE ET AL.

[MOTION TO AMEND JUDGMENT NUNC PRO TUNC.]

1. *Recital in judgment, unless shown by record to be untrue, sufficient to sustain it.*—A recital in a judgment *nunc pro tunc*, that sufficient matter to authorize its rendition was disclosed to the court “by sufficient, competent, and satisfactory evidence,” will sustain the judgment, if the parties appear to the motion, and do not show, either by bill of exceptions or in some other appropriate manner, that the recital is untrue.

APPEAL from the Circuit Court of Lawrence.

Tried before the Hon. JOHN E. MOORE.

The appellants, suing as partners, obtained a judgment before a justice of the peace against Henry Gillespie and Lucy Gillespie, which was removed by *certiorari*, on the petition of the said Lucy Gillespie, to the circuit court. The plaintiffs there filed a complaint on a bond; to which Lucy Gillespie pleaded coverture, and her co-defendant *nil debet*. At the March term, 1855, a trial was had on issues joined on these pleas, when the jury found a verdict in favor of Lucy Gillespie, and against Henry Gillespie; and the court thereupon rendered judgment, that said Lucy Gillespie go hence without day, and that the plaintiffs recover of said Henry Gillespie, and of his sureties on the *supersedeas* bond, the amount of the debt and damages assessed by the jury, with the costs.

Henry Gillespie afterwards filed a petition in the court, directed to the clerk, alleging that an error had been committed in the taxation of the costs, and praying that the sheriff might be instructed not to collect the items erroneously taxed against him; and the clerk issued an order to the sheriff in accordance with the prayer of the petition.

At the September term, 1855, the following judgments were rendered in the cause:

" Came the parties, by their attorneys; and on motion of the defendant, Lucy Gillespie, it appearing to the satisfaction of the court that there has been an error committed by the clerk in the taxation of the costs, in failing to allow the said Lucy Gillespie an attorney's fee, and also in failing to allow her against plaintiff an aliquot proportion of the costs of this case in addition to said attorney's fee; and it appearing to the satisfaction of the court that the said Lucy Gillespie made a successful defence in this case: It is therefore ordered, adjudged, and decreed by the court, that said Lucy Gillespie recover of said Price & Simpson, plaintiffs in this case, a tax-fee of \$5, and one half of the costs incurred; and that she go hence without day."

" Came the parties, by their attorneys; and defendants suggest that a manifest error has been made in the entry of the judgment in this case, at the last term of this court, in entering the same against John R. McBride and Henry A. McGehee, as the sureties of Henry Gillespie on an appeal bond in this case; and the said error appearing to the court, by sufficient, competent, and satisfactory evidence, on motion of the defendants, it is ordered, adjudged, and decreed by the court, that the judgment heretofore rendered in this case be revoked, annulled, and held for naught, and that the following judgment be rendered now for then: Came the parties, by their attorneys; and the said Lucy Gillespie pleads coverture, in short by consent, and the said Henry Gillespie pleads *nil debet*, in short by consent; and issues being taken, thereupon came a jury," &c., " who, upon the issues joined do say, ' We, the jury, do find the issues on the plea of coverture in favor of the defendant Lucy Gillespie, and the issue of *nil debet* on the other plea for the plaintiffs, and assess the plaintiffs' debt at \$30 66, together with the further sum of \$12 50 damages

by way of interest, together with their costs.' Thereupon, it is considered by the court, that the defendant Lucy Gillespie go hence without day, and that plaintiffs recover of said Henry Gillespie the said sum of \$30 66 debt, damages, and interest, assessed by the jury as aforesaid, beside their costs," &c.

The following errors are now assigned:

"1. The court erred in setting aside, revoking and annulling the judgment rendered in this cause at the March term, 1855, by the judgment rendered at the September term, 1855.

"2. The court erred in revoking, annulling and setting aside the judgment rendered against Henry Gillespie, and John R. McBride and H. A. McGehee, the sureties on the *supersedeas* bond, at the March term, 1855, by the judgment rendered at the September term, 1855.

"3. The court erred in rendering the judgment *nunc pro tunc* at the September term, 1855, after the rendition of the judgment at the March term, 1855.

"4. The court erred in rendering the judgment *nunc pro tunc* at the September term, 1855, upon the petition of Henry Gillespie to re-tax the costs."

PETERS & HODGES, for the appellants.

DAVID P. LEWIS, *contra*.

RICE, J.—A recital in a judgment *nunc pro tunc*, that sufficient matter to authorize it to be entered was disclosed to the court "by sufficient, competent and satisfactory evidence," will sustain it, if the parties appeared upon the motion to perfect the judgment, and do not show by bill of exceptions, or in some other appropriate manner, that such recital is untrue.—*Rains v. Ware*, 10 Ala. R. 623.

The entry made at the September term, 1855, of the circuit court of Lawrence, whereby the judgment rendered at the preceding term was "revoked, annulled, and held for naught," and another judgment substituted for it, is a judgment *nunc pro tunc*, and must be sustained upon the principle above announced. The first three assignments of error relate to that entry, and show no cause for reversal. The fourth assignment of error assumes that there was a judgment *nunc pro tunc*, rendered "upon the petition of Henry Gillespie to re-tax

the costs." This assumption is not sustained by the record. The judgment for re-taxation of costs was rendered upon "the motion of the defendant, *Lucy Gillespie*," and is not embraced by the assignments of error.

There is nothing embraced by the assignments of error which authorizes a reversal, and the judgment is affirmed.

WALLACE vs. NELSON, ADM'R, &c.

[ACTION ON INJUNCTION BOND—TAXATION OF COSTS.]

1. *Construction of statute imposing costs on successful plaintiff, in action against executor or administrator, for failure to prove presentation of claim.*—Under the statute (Code, § 1887) which imposes the costs on a successful plaintiff, in an action against an executor or administrator, commenced after the death of the testator or intestate, for a failure to prove a presentation of his demand, if the defendant intends to raise the question of presentation, he must present it on the record by plea or suggestion, so that the plaintiff may have an opportunity of proving the presentation, and the issue must be tried by the jury; but, if no such plea or suggestion is made, and the plaintiff has a general verdict on the issues joined, he is entitled to full costs.

APPEAL from the Circuit Court of Shelby.

Tried before the Hon. E. W. PETTUS.

This was an action on an injunction bond, brought by Samuel Wallace against Hudson W. Nelson, as administrator of Henry W. Robertson, deceased, and was commenced in August, 1854. The defendant pleaded, in short by consent, 1st, "that plaintiff has sustained no damage by the issuance or execution of said injunction, or from the filing of the bill in said case"; 2d, "covenants performed"; and, 3d, "accord and satisfaction." A trial was had, on issues joined, at the September term, 1854, and the jury returned a verdict for the plaintiff, assessing his damages at \$939; and the court thereupon rendered judgment against the defendant, for the damages and costs of suit, to be levied of the goods and

chattels of his intestate. At a subsequent day of the same term, as appears from the bill of exceptions, the defendant entered on the motion docket a motion in the following words: "Motion will be made in this case to tax the plaintiff with the costs of this suit, on the ground that the suit was for a cause of action originating in the lifetime of the intestate, and brought against his administrator since his death; and there was no proof of presentation to, or demand of payment of, the administrator before suit brought." On the hearing of this motion, the plaintiff in the judgment offered proof to the court, to show that the claim sued on had been presented to the administrator of the intestate's estate, before the suit was brought, and that he had failed to pay the same; but the court refused to hear this proof, and directed the costs of this suit to be taxed against the plaintiff; and the previous judgment was amended accordingly. The plaintiff excepted to this action of the court, and he now assigns it as error.

MORGAN & MARTIN, for the appellants:

1. It is an invariable rule, in all common-law proceedings, that the costs follow the judgment, the judgment follows the verdict, and the verdict follows the issues, to which it must respond. Here there was nothing, either in the issues or in the verdict, that authorized a judgment against the plaintiff, who had certainly made out his case. The question of presentation, under the statute (Code, § 1887), is matter of defence, so far as the costs are concerned, and should be pleaded, like a tender, the statute of frauds, the statute of non-claim, &c.; for that which affects the judgment for costs, which are an inseparable incident to the judgment at law, is matter of defence.

2. But, if the question of costs could be reached by motion, the court certainly ought to have allowed the plaintiff to prove that the claim had been duly presented.

3. The appellant only asks a correction of the judgment in the matter of the taxation of costs, without a remandment of the cause.—*Yarborough v. Scott*, 5 Ala. 221; *Sellers v. Smith*, 11 *ib.* 264; *Smith v. Robinson*, *ib.* 271.

ALEX. & JOHN WHITE, *contra*, contended,—

1. That, although a judgment, in ordinary actions at common law, carried the costs; yet, in a case like this, the statute requires the plaintiff, to entitle himself to costs, to make proof, on the trial of the cause, that his demand was presented to the administrator before suit brought; and that his failure to make this proof subjects him to the costs, as in case of witnesses who are summoned but not examined.

2. That the matter was properly brought to the attention of the court by motion, as in the analogous cases of motions to re-tax, to dismiss for want of security for costs, &c.

CHILTON, C. J.—The Code (§ 1887) declares, that, “in any action against an executor or administrator, commenced after the death of the testator or intestate, if the plaintiff fail to prove a presentation of the claim or demand, he must pay the cost of suit, although he may recover.” Section 2375 declares, that “the successful party, in all civil actions, is entitled to full costs, for which judgment must be rendered, unless in cases otherwise directed by law.” By the section first named, a fact is required to be proved, as an essential prerequisite to a judgment for the costs. Before whom must it be proved, and who is to determine whether it is proved,—the judge, or the jury? The statute is silent on this subject. We are satisfied that the jury should try the fact of presentation. It may often be a fact of more importance than the proof of many items of the demand, since it involves a greater loss to the party by so much as the costs exceed those items. It may be strongly contested, and the proof conflicting. Now it is against the course of the common law to make the judge the trier of facts, making his determination the predicate for a judgment, as would often happen, for large sums of money. The judge, unless otherwise directed by statute, decides the law, and the jury find the facts.

Again, this section was not designed to force upon the parties an issue, irrespective of their concessions by the pleadings, and thus to entail upon estates the superadded cost of witnesses to prove presentation of demands, when the fact of presentation was not controverted upon the trial.

The obvious design of the statute was, to prevent estates from being mulcted into costs, an account of demands which

would have been paid or arranged without such costs, had they been presented to the personal representatives of decedents. It was to save, not to superadd costs; and the statute being silent as to the mode in which the matter of presentation shall be tried, it is our duty to mould the practice so as to effect the end intended to be accomplished. The judgment must be predicated upon the verdict of the jury, which verdict, whether general or special, must ascertain sufficient matter of fact to enable the court to pronounce, as a conclusion of law, for whom and for what the judgment must be rendered. In this case, the verdict is general, and, by reference to the issues educed by the pleadings, involves no determination or finding upon the question of presentation.

If the administrator intended to raise a question of that sort, he should have presented it by a suggestion or plea in bar of the cost, upon the record, with his other pleas, so that the opposite party would have had an opportunity of proving that the claim or demand had been duly presented before the suit was instituted. If he merely wishes to controvert the claim or demand upon its merits, then he may omit such suggestion or plea, and save the estate, in the event it is cast in the suit, the expense of the witness or witnesses by whom such fact could have been established. Nothing of the kind was done in this case. The verdict and pleadings warranted the judgment for the damages found by the jury, which finding, under section 2375 of the Code, above referred to, entitles the successful party to full costs.

It results from what we have said, that the judgment for damages and costs was correctly entered upon the finding; that the court, upon motion, improperly set aside the judgment as to the costs and rendered it against the plaintiff; and that this last judgment must be here reversed, and the proper judgment, conforming to that originally entered, here rendered upon the verdict.

DUNHAM vs. ROBERTS, ADM'R, &C.

[MOTION TO AMEND RECORD *NUNC PRO TUNC*.]

1. *Amendment of record on allegation of fraud.*—The general rule, which requires some matter of record, entry, or memorandum in the handwriting of the judge, to authorize an amendment of the record *nunc pro tunc*, does not apply to cases in which the entry is impeached for fraud; and though these cases generally arise collaterally, yet an entry relating to a grant of letters of administration may be amended on a direct application, of which the opposite party must have notice, setting forth the fraud specifically, and making the necessary proof.
2. *Allegation of fraud must be specific.*—If the motion simply states, as the ground for the amendment asked, that the record states a fact which was not proved, that as it stands it operates a fraud on the rights of the plaintiff in the motion, and that it is void in law, on account of fraud in a legal sense, the allegation is not sufficiently specific to authorize the introduction of parol evidence to prove that the fact recited was not true.

APPEAL from the Court of Probate of Pickens.

On the 13th March, 1854, letters of administration on the estate of William C. Dunham, deceased, were granted by said probate court to Alexander B. Clitherall and Andrew J. Roberts; and the order appointing them recites, "It being made known to the court by said Alex. B. Clitherall, special attorney for Melissa C. Dunham, that the said Melissa, the widow of the said deceased, relinquishes to the said applicants her claim of the said administration, and no person else objecting thereto, it is ordered", &c. At the May term, 1854, as appears from the bill of exceptions, the following motion was made:

"This day, in open court, comes the said Melissa C. Dunham, widow of said William C. Dunham, by attorney, and moves the court to amend and make up the record in this cause, *nunc pro tunc*, to correspond with the facts, 1st, because the record was not made up within ten days from granting the letters of administration; 2dly, because the record was made up after the ten days from granting letters of administration, and does not recite the facts in this: the judge, who

made up the record in the said cause, made the record recite that the said Melissa C. Dunham, by her special attorney, Alex. B. Clitherall, renounced her right to administer on said estate, when in fact said Melissa C. Dunham avers that she never did renounce her right to administer, and that said attorney in fact did not so state or renounce in her behalf, and that said record, as it now stands, is a fraud on the rights of said Melissa C. Dunham; 3dly, and for that she, the said widow, had no opportunity to appeal,—all of which facts she, the said Melissa C. Dunham, is here now ready and willing to substantiate by legal evidence; 4thly, because said record was not made up at *time* (?) by agreement of parties that it should embrace the facts, when in fact the said record does not show the facts, as the said Melissa C. Dunham is ready to prove; 5thly, that said record is no record, and void in law, on account of fraud in a legal sense on the rights of said Melissa C. Dunham."

On the hearing of the motion, Mrs. Dunham offered several witnesses "to prove the facts set forth in said motion, and that the causes set forth therein are true"; but the court held "that it was not competent to prove the facts set forth in said motion by oral testimony, and thereupon overruled said motion." The plaintiff excepted to this ruling of the court, and she now assigns it as error.

WATTS, JUDGE & JACKSON, for the appellant, assigned errors, and submitted a brief by C. R. CRUSOE, who insisted that, the motion being predicated on an allegation of fraud, parol evidence was competent to establish the facts; citing the following cases: *Paysant v. Ware & Barringer*, 1 Ala. 166; *Mead v. Steger*, 5 Porter, 498; *Franchot v. Leach*, 5 Cowen, 508; *Dorr v. Munsell*, 13 Johns. 431; *Commonwealth v. Bullard*, 9 Mass. 270; *Chitty on Contracts*, 527; 1 Green. Ev. § 284; 2 Starkie, 340; *Corbin v. Sistrunk*, 19 Ala. 206; *Morton v. Chandler*, 8 Greenl. 9.

TURNER REAVIS, *contra*, contended that parol evidence was not sufficient to authorize an amendment of the record; and cited *Saltmarsh v. Bird*, 19 Ala. 665; *Benford v. Daniels*, 13 *ib.* 667; *Bondurant v. Thompson*, 15 *ib.* 202.

GOLDTHWAITE, C. J.—This was a motion, made by the appellant, to amend the record of the probate court, as made in an application for the grant of letters of administration, so as to correspond with the facts.

The motion was made at a subsequent term of the court, and was endeavored to be sustained entirely by parol evidence. The general rule unquestionably is, that, to sustain a motion of this character, there must be some matter of record, entry, or memorandum of the judge to amend by.—*Thompson v. Miller*, 2 Stew. 470; *Armstrong v. Robinson*, 2 Ala. 164; *Benford v. Daniels*, 13 Ala. 667; *Bondurant v. Thompson*, 15 Ala. 202.

It is urged, however, on the part of the appellants, that this rule does not apply in cases where the entry complained of was fraudulently made; and it is unquestionably true, that a record may be impeached on that ground (*Fermon's case*, 3 Co. 78 b) by any one who is neither a party nor a privy to it.—*Cow. & Hill's Notes to Ph. Ev.* 854, 855. In most cases, this is done collaterally; but this mode would not be effectual, as regards grants of administration. There it would be necessary to resort to a direct proceeding in order to vacate the judgment; and, in all such cases, we think that, by virtue of the powers which courts possess over their records and officers, this may be done on application and notice to the other party, setting forth the fraud specifically, and making the necessary proof.

In the present case, however, the motion does not set forth the fraud with any precision, but states simply, as one ground for the amendment, that the record shows a fact that was not proved, and that "the record, as it stands, operates as a fraud" on the rights of the appellant; and, in another part, it alleges that "the record is void, in law, on account of fraud, in a legal sense," upon her rights. We do "not think the allegation of fraud is sufficiently specific; and without this, the averment that a fact was recited in the record, which was not proved, would not warrant the introduction of parol evidence to show that such was the case, without violating a well settled principle as to the verity and conclusiveness of records.

There is no error in the record, and the judgment is affirmed.

GRADY ET AL. vs. ROBINSON.

[BILL IN EQUITY TO OBTAIN DIVESTITURE OF LEGAL TITLE TO LAND, AND TO ENJOIN ACTION AT LAW FOR ITS RECOVERY.]

1. *What constitutes partner quoad third persons.*—On the formation of a partnership for the purpose of speculating in Indian lands, certain rules and regulations were adopted, at a meeting of the company, by which the number of shares was fixed, and his interest assigned to each partner; and by which it was required, that a specified sum should be paid on each share,—that relinquishments should be executed to the company, of all interests in any of the lands embraced in their contract; that any service should be performed for the company, in furtherance of its business, when called upon by a resolution of the company; and that a failure to comply with any of these requisitions, or any violation of good faith to the interest of the company, should forfeit to the company the interest of the person so offending: *Held*, that a person to whom an interest in the company was assigned at this meeting, and who assented within a reasonable time afterwards to take it, was liable as a partner, at least *quoad* third persons who afterwards dealt with the company, although he was not present at the meeting, did not pay the installment on the share assigned to him, did not execute the relinquishments, and did not perform any of the services required by the rules and regulations.
2. *Relinquishment by partner, without notice, no discharge of liability to third persons.*—A relinquishment by one ostensible partner to another, of all his interest in the partnership, does not discharge him from liability as a partner to third persons who afterwards deal with the company without notice of such relinquishment.
3. *Evasive answer, as to facts within personal knowledge, equivalent to admission.*—Where material facts are stated in the bill, which, *prima facie*, are within the knowledge, information, or belief of the defendant, his failure to deny them, or to express his belief of their falsity, or to state that he cannot form any belief respecting their truth, is a virtual admission that they are true. He cannot shelter himself behind equivocal, evasive, or doubtful terms, nor behind a literal denial which amounts to no more than a negative pregnant.
4. *Proof confined to facts in issue.*—The defendant cannot be permitted to prove, in bar of the relief sought by the bill, a fact which he failed to put in issue in his answer.
5. *Partner's authority to bind firm by sealed instrument.*—A sealed instrument, executed by one partner in the name of the firm, under a prior verbal authority, or subsequently verbally ratified, is binding on the firm.

APPEAL from the Chancery Court of Macon.

Heard before the Hon. JAMES B. CLARK.

This bill was filed by Alfred T. Grady, Joseph Moreland, Charlton Wright, and Phoebe Key, against Alexander J. Robinson, to obtain a divestiture of the legal title to a certain tract of land held by the defendant, and to enjoin an action at law for its recovery. The complainants claim to be sub-purchasers from R. J. Grigg and Adam Hardin, who bought from James C. Watson & Co.; and they allege that the defendant was a member of the firm of James C. Watson & Co., at the time of the purchase by Grigg and Hardin; that he was bound as a partner, and under a special contract with said Hardin, to obtain a patent for said lands in the name of the company; and that he fraudulently procured a patent in his own name, under which he has instituted an action at law for the recovery of the land. The firm of James C. Watson & Co. was formed for the purpose of speculating in Indian lands; and the bill alleges that, at the time they sold to said Grigg and Hardin, they held a claim on said land, by virtue of a contract made with the chiefs of the Creek Indians, known and generally called the "Big Contract." The contracts between the said James C. Watson & Co. and Grigg and Hardin, which are under seal, and dated December 27, 1842, are appended to the bill as exhibits A and C. The bill alleges that possession was taken under the contracts, the purchase money paid in full, and valuable improvements erected on the lands.

The defendant answered the bill, and the material parts of his answer are stated at length in the opinion.

The chancellor, on final hearing, on pleadings and proof, so modified the injunction as to allow the defendant to proceed with his action at law for the recovery of the possession of the land, but enjoined him from recovering any damages, and taxed him with the costs; and from this decree the complainants now appeal.

The action of the chancellor in suppressing certain portions of the depositions of Peter C. Harris and Littleberry Strange, is also assigned for error. The fourth and sixth direct interrogatories to these witnesses were as follows:

"*Int. 4th.*—Look upon said exhibits [A and C, attached to the bill], and state all you know that will tend to show that the agreements therein stated were entered into by said

J. C. Watson & Co. as therein set forth. Do you know the handwriting in which the name of J. C. Watson & Co., appended to said exhibits, is written, from having seen the person who signed it write? If yea, in whose handwriting is said name written, and what authority had the person who wrote the same to enter into the agreements contained therein in the name of J. C. Watson & Co.?"

"Int. 6th.—State all you know that will tend to show that unpatented lands, belonging to the persons composing said company, were, at the date of said exhibits, the subject of sale by said persons, in the name of J. C. Watson & Co., or that said agreements are not less binding on said persons than if executed by each and every one of them in his own proper handwriting."

The answers of said Harris were as follows:

"To the 4th interrogatory he answers, that he has examined said exhibits, and states that *James C. Watson was fully authorized to make such a contract*; that the 'James C. Watson & Co.' is in the handwriting of said James C. Watson; that he knows it is the signature of said Watson from having often seen him write."

"To the 6th interrogatory he answers, that *James C. Watson was fully authorized to sell all the lands embraced in the Watson contract*."

The answers of said Strange were as follows:

"To the 4th interrogatory he answers, having examined the signature of J. C. Watson & Co. to said exhibits, that the signature thereto is in the handwriting of said James C. Watson; that he knows it from having seen him write frequently; that said Watson was trustee for said company of J. C. Watson & Co., and had full authority to sell and convey the real estate belonging to said company."

"To the 6th interrogatory he says, that if James C. Watson had authority to sell any land, whether patented or not, other than the lands of said James C. Watson & Co., he does not know it, but he had full authority to sell and convey any lands of said company, whether patented or not."

The chancellor, on motion of the defendant, suppressed the italicized portions of these answers, on the ground that the authority of said Watson was in writing, and could not be proved by parol.

All the other material facts of the case, as here presented, will be readily understood from the opinion.

JAS. E. BELSER, and GEO. W. GUNN, for the appellants:

1. The defendant's answer to the Collins bill is evidence against him, as also his admissions to the witnesses.—*Brandon v. Cabiness*, 10 Ala. 156; *Julian v. Reynolds*, 8 *ib.* 680; *Holman v. Bank of Norfolk*, 12 *ib.* 370; 9 *Wheat.* 831.

2. An equivocal answer is entitled to but little weight, especially when it is contradicted by other writings and statements of the defendant.—*Gamble v. Johnson*, 9 Mo. 598.

3. The evidence establishes the fact that the defendant was a partner in the firm of James C. Watson & Co., and the complainants have an undoubted right to treat him as such. His answer to the Collins bill contains his own admission of the fact, and no public notice was ever given of his withdrawal.—6 *Porter*, 138; 2 Ala. 502; 5 *ib.* 173; 10 *ib.* 156; 12 *Sm. & Mar.* 538; 4 *Shep.* 261; 2 *Watts & S.* 411; 7 *Miss.* 414; 7 *Blackf.* 170; 12 *Vermont*, 291.

4. The functions, rights and duties of partners comprehend those of trustees and agents.—*Collyer on Partnership*, §§ 182 to 186. A partner cannot undertake incompatible duties, nor become an actor in a transaction to the prejudice of one dealing with the partnership, nor acquire a title adverse to the partnership vendees.—*McGehee v. Lindsay*, 6 Ala. 16; *Crutchfield v. Haynes*, 14 Ala. 52; *Story on Agency*, § 217.

5. If the defendant was not a partner, and did not obtain the patent as the agent of Hardin, still his conduct and declarations induced Hardin and his vendees to believe that he was acting for them; he is estopped, therefore, from setting up a purchase in his own name, which enures to their benefit. 20 *Conn.* 563; 14 *Penn. State R.* 343; 7 *Blackf.* 170; 10 Ala. 400; 22 *ib.* 543.

6. The allegations of the bill, as to the fraud in procuring a patent, are abundantly proved.—*Kennedy v. Kennedy*, 2 Ala. 577; *Bishop v. Bishop*, 13 *ib.* 475; 10 *ib.* 156.

7. Purchasers for valuable consideration, without notice of a prior equity, are entitled to pay for improvements made. *Patrick v. Marshall*, 2 *Bibb*, 45; *Woods v. Patrick*, 3 *ib.* 20; 3 *Litt.* 399; 1 *A. K. Mar.* 246, 389; 3 *Dana*, 245; 6 *Mon.*

557; 4 J. J. Mar. 170; Goodwin v. Lyon, 4 Porter, 297; 3 Paige, 545; 1 Story, 478; 13 Ala. 43; 4 Gill, 87; 4 Litt. 370; 1 Johns. Ch. 344.

CLOPTON & LIGON, *contra*, contended,—

1. That the defendant was not a member of the firm of James C. Watson & Co., at the time of the sale to Grigg and Hardin. He was not present at the formation of the company, and was not one of the contracting parties. He was not present at the meeting in August, 1837, when a half share was assigned to him by the original contractors; and hence he did not thereby become a member, unless said share was afterwards accepted by him, either in writing, or by some act. After said half share was assigned to him, his membership in the company depended upon certain conditions; one of which conditions was the payment of \$6,000 on each full share, and the like proportion on each part of a share, within twenty days from the time of said meeting; and also certain other duties required by the seventh resolution of the company. None of these conditions was ever complied with by the defendant. He denies that he was a member; and there is no proof of any act done by him binding him by the resolutions of the company. His admission, in his answer to the Collins bill, that he was a member, cannot estop him in this case. That admission may (and indeed must) have been made in consequence of wrong advice as to his rights and liabilities in relation to the company; and such an admission cannot estop him, unless the complainants acted upon it, or were misled by it.—Gamble v. Gamble, 11 Ala. 976. That question is now directly put in issue; and the evidence fully shows that he was not a partner, either in law or in fact. He could not be a member of a company for speculating in lands, except by some instrument in writing signed by himself, or by his duly authorized agent.—Collyer on Partnership, 3, note 2; Larkins v. Rhodes, 5 Porter, 195; Duren v. Parsons, *ib.* 345.

The answer states, in explicit language, “that, at the time said contracts of purchase with Jas. C. Watson & Co. are alleged to have been made, this defendant was not a member of said company.” This plain and positive denial is directly

responsive to the allegation of the bill. The statement of facts which is afterwards inserted in the answer, is a mere relation of the organization of the company. The simple denial, of itself, would have been sufficient; but the statement of the additional facts cannot subject the answer to the charge of evasiveness and vagueness. If, however, the answer were obnoxious to this charge, the complainants should have excepted to it for that reason; but they cannot construe it into an admission of the allegations of the bill, in face of the general and positive denial.—Whitney v. Belden, 3 Edw. 386.

2. But, if the court should hold the defendant a partner in the company, then we contend that the company was not bound by the contracts of Grigg and Hardin. These contracts were made by James C. Watson, who had no authority to sell any lands, except as he was authorized in writing: his only authority was to sell the lands patented.—12 Ala. 580; Story on Partnership, §§ 101, 168; Collyer on Partnership, § 1137.

3. If the defendant was a partner at all, he was only a dormant partner, whose liability does not extend to speculations in the purchase and sale of lands.—Collyer, 3, note 4; Story, § 83; 4 Mass. 424; 3 Sumner, 435.

4. The complainants, having purchased with a knowledge of the defects in their titles, are not entitled to pay for their improvements.—2 Story's Equity, § 1238; Lamar v. Minter, 13 Ala. 40; Hanrick v. Herbert, 16 *ib.* 581; 8 Wheat. 82; 4 Cowen, 168.

RICE, J.—Individuals who would not be held partners *inter sese*, may become liable as partners *quoad* third persons. Hesketh v. Blanchard, 4 East, 144; Hazard v. Hazard, 1 Story's C. C. Rep. 371; Story on Partn. § 60; Collyer on Partn. §§ 78–86.

The first question for consideration in the present case, is, whether, upon what appears in the record, the complainants have the right to treat the defendant as a partner in the company of James C. Watson & Co.

The bill states, among other things, that said company was formed "for the purpose of speculating in Indian lands, which were to be disposed of by the government of the

United States, under the treaty made by the said government with the Creek Indians in 1832"; that on the 27th December, 1842, the time when the agreements shown in exhibits A and C, attached to the bill, were executed, said company was composed of James C. Watson, *Alexander J. Robinson, the defendant*, and a number of other persons whose names are stated; that at the time said agreements were executed, the said Robinson "was a member of said trading firm", and "was bound by his connection with the said company, and by the said agreements, made by the said company with the said Grigg and Hardin, whenever a patent was obtained for the lands" mentioned in said agreements, "to aid said company in carrying out the conditional contracts therein set forth", &c., &c.; that the said Hardin, for the benefit of complainants, agreed with the defendant, that he "should actively engage himself in obtaining a patent from the government of the United States to James C. Watson & Co., for the lands mentioned in exhibits A and C, for which service he, the said Hardin, was to pay said Alexander J. Robinson the sum of fifty dollars."

The defendant, in his answer, "admits that the said James C. Watson & Co. was a company formed for the purposes alleged in said bill", but "denies that, at the time said contracts of purchase with James C. Watson & Co. are alleged to have been made, this defendant was a member of said company; and for answer states the following facts, upon information and belief: On the 28th August, 1836, a contract of purchase was made and entered into by James C. Watson, Edward Hanrick, Peter C. Harris, John Peabody, and William Walker, on the one part, and certain chiefs of the Creek Indians, aided by Gen. Jessup, for the purchase of certain lands known as reverse contracts, in what was called Dr. McHenry's District, for the sum of seventy-five thousand dollars. On the 28th day of April, 1837, the said James C. Watson, Edward Hanrick, Peter C. Harris, John Peabody, and Wm. Walker, by his executor, Edward Hanrick, held a meeting at Columbus, Georgia, and adopted rules and regulations for said company; at which Alfred Iverson was admitted as an original contractor, and was present. The fourth, fifth, seventh and eighth of said rules and regulations are as follows: '4th.

The shares of said company shall be twenty, to be divided and assigned as follows, viz.: James C. Watson, Edward Hanrick, John Peabody, Peter C. Harris, Alfred Iverson, and William Walker's estate, shall each have one full share; Joseph Fitzpatrick, Dozier Thornton, jr., Nat Macon Thornton, Thomas S. Woodward, John A. Hudson, Columbus Mills, Luther Blake, Daniel McDougald, Edward Carey, *Alexander J. Robinson*, John & N. F. Collins, L. B. Strange, John J. McCrary, George Stone, and William Vann, shall have each one-half share; James Wadsworth and Paddy Carr shall have one-fourth of a full share; and the remaining four and a half shares shall be reserved for future distribution and appointments by the company.' '5th. The sum of six thousand dollars upon each full share, and the like proportion for each part of one, shall be paid, within twenty days from this date, to the treasurer, who is authorized to give receipts for the same.' '7th. The persons heretofore designated as shareholders, and any others that may be hereafter admitted, shall be compelled to pay promptly all installments or sums which which may be voted by the company, and shall also make and execute relinquishments to the company, of all interest, right, title, or claim, in and to any land which has been or may be embraced in said contract; and further, it shall be the duty of every shareholder to do and perform any service in the furtherance and completion of the business of the company, for which they may be called upon by a resolution of the company. And that, upon failure to comply with the requisitions aforesaid, or upon any violation of good faith to the interest of the company, the claim or above interest of such person shall be held and claimed as forfeited to the company.' '8th. The control of the company, or the adoption of all rules or regulations, and other business of the company, shall be holden exclusively in the hands of the original contracting parties and Alfred Iverson, who is hereby admitted as an original contractor.' *This defendant understood that he was to have and be entitled to one half share.* But this defendant states, further, that he was not present at said meeting held in Columbus on the 28th April, 1837, has never paid any thing by way of installment, or otherwise, into the treasury of said company, has never paid any thing

upon said half share, and has never received any thing from said company as a co-partner, or on account of said half share. This defendant was, at one time, *the agent of said company*, in paying off the Indians and *closing said contract*, and received compensation for *his services as said agent*; but has never received any thing from said company in any other capacity. This defendant, further answering, states that, previous to the year 1842, and to the execution of said agreements with the said Grigg and Hardin, and, as well as this defendant now recollects, *in the year 1839, this defendant relinquished in writing all the interest which he then had in said James C. Watson & Co. to the said James C. Watson*, and without any consideration being paid to this defendant by the said James C. Watson. This defendant, further answering, saith, that he denies that at any time the said Adam Hardin, *for the benefit of complainants*, agreed with this defendant that this defendant should actively engage himself in obtaining a patent from the government of the United States to James C. Watson & Co., for said land mentioned in exhibits A and C, and for which service the said Hardin was to pay this defendant the sum of fifty dollars. This defendant states that, on the contrary, in the latter part of the year 1844, and *before any of the complainants* had acquired any interest in said lands, the said Hardin called to see this defendant, at his residence in Columbus, Georgia, where he was confined by sickness, stated to this defendant his purchase of said lands, and asked the assistance of this defendant to procure a patent for the same. This defendant expressed a willingness to said Hardin to assist him, and offered to do any thing he could to assist him. The said Hardin probably said that he would pay fifty dollars to procure a patent, but this defendant denies that he ever agreed to accept said sum, and referred the said Hardin to Alfred Iverson as a competent and proper person to procure said patent."

The defendant does not pretend that he was, at any time, a *dormant* partner. He makes no defence of that kind, nor does he plead or rely on the statute of frauds. If, therefore, his answer, when construed according to established rules, in connection with the bill, amounts virtually to an admission, either that the half share assigned to him by the aforesaid

rules and regulations adopted by the original partners on the 28th April, 1837, was thus assigned to him according to his previous request, or that within a reasonable time after it was thus assigned he assented to take it as so assigned to him, he thereupon became a partner in said company; at least as to third persons who afterwards dealt with the company; although he was not present when said rules and regulations were adopted, and although he has never paid nor received any thing on account of said half share. An agreement to take and pay for the fixed half share in the partnership, assigned to him as aforesaid, in accordance with the provisions of said rules and regulations, would amount to a contract of partnership, and make him a partner; at least as to third persons afterwards dealing with the company. The provision, that the shareholders should pay promptly all installments or sums voted by the company, and execute such relinquishments as are specified in the seventh of said regulations, and perform such service as therein mentioned, has neither the form nor force of a condition precedent, or of a limitation of time, at which the contract of partnership should take effect between the original partners and the several persons who are "designated as shareholders" in said rules, and who in any manner agreed to take the shares or fractions of shares as assigned to them respectively by said regulations. The failure to pay the installments, or to execute the relinquishments, or to perform the services as provided for therein, might have given to the company the privilege or election to claim the share or interest of the partner so in default, "as forfeited to the company"; but the company was not bound to assert such claim, and it is not pretended that it has done so, either as to the defendant or any other designated shareholder.—Goddard v. Pratt, 16 Pick. Rep. 412; Herbert v. Hanrick, 16 Ala. R. 581; Patterson v. Ware, 10 *ib.* 444; Collyer on Partn. §§ 86, 467.

The defendant does not, in his answer, say that he was not a partner in said company at some period prior to the 27th December, 1842, the time when the agreements with Grigg and Hardin were made. He does not even venture a plain and positive denial of the allegation that he was at that time a partner. His seeming denial of that allegation is carefully

linked with a statement of "facts", which destroy its force as a real denial. Among the "facts" thus stated in his answer, is, that the "*defendant understood that he was to have and be entitled to one half share*", and that by the rules and regulations adopted by the original partners "one half share" was assigned to him! True, he asserts "*he was not present*" at the meeting by which these rules and regulations were adopted, although his answer shows it was held in the city where he resided. True, he asserts that he never paid or received any thing on account of said half share. And there is an elaboration in his assertions upon this point, which contrasts strikingly with his unbroken silence upon other points fully as important, and fully as much within his knowledge or belief. Although he says "*he was not present at said meeting*"; yet he does not say he was ignorant of its proceedings, even whilst they were going on. Although he says he did not pay or receive any thing on account of said one half share; yet he does not say he did not authorize, assent to, and ratify the proceedings of said meeting whereby said one half share was assigned to him. Although he says that, in 1839, he relinquished in writing, without any consideration, all the interest which "*he then had* in said James C. Watson & Co." (not to the company, but) to James C. Watson; yet he does not say it was some interest other than the said "one half share", nor does he explain why he relinquished his interest in a company owning so large a quantity of land, without any consideration. Although he says he "*understood he was to have and be entitled to one half share*", he does not tell why, nor when, this understanding had its origin, nor does he say that he objected to having the one half share assigned to him, or that he had never sanctioned the setting apart of that half share to him.

If in his answer he had contented himself with a plain denial that he was a partner on the 27th December, 1842, it may be conceded that the complainants would then have been bound to overcome that denial by the testimony of two witnesses, or of one witness and some circumstance of corroboration. But the "facts" with which he has accompanied and linked his seeming denial, and upon which he has evidently based it, not only deprive it of all force as a real

denial, but amount virtually to an admission, that from April, 1837, until his relinquishment to James C. Watson in 1839, he was a partner in said company, and that he still continues to be responsible as such partner, unless the legal effect of his said relinquishment to Watson terminated his connection with the company as one of the partners and his responsibilities as such partner.

We are constrained to put this construction on this answer, by well-settled rules. Where material matters are stated in the bill, which, *prima facie*, are within the knowledge, information, or belief of the defendant, if in his answer he fails to deny them, or to express his belief of their falsity, and does not state that he cannot form any belief respecting their truth, they must be considered as admitted, without any order taking them for confessed.—*McClain v. Waters*, 9 Dana, 55; *Bailey v. Wilson*, 1 Dev. and Batt. Eq. Rep. 187. A vague manner of denial of such matters, is always received unfavorably. A defendant is not at liberty thus to put in issue allegations, which he may *know*, or fully *believe*, to be true. If he expresses himself obscurely, and leaves to the court the task of divining his meaning, the court adopts that construction of his language which is strongest against him. He cannot be allowed to shelter himself behind equivocal, evasive, or doubtful terms, and thus mislead the complainant; nor behind a literal denial which amounts to no more than a negative pregnant, or an evasion of the point of substance.—*Hill v. Lackey*, 9 Dana, 83; *McClain v. Waters*, and *Bailey v. Wilson*, *supra*; *Brooks v. Byam*, 1 Story's Rep. 296; *Deveraux v. Cooper*, 11 Vermont Rep. 104; *Morris v. Parker*, 3 Johns. Ch. Rep. 297; *Smith v. Lasher*, 5 Johns. Ch. Rep. 247; *Talbot v. Sebree*, 1 Dana, 56; *Story's Eq. Pl.* §§ 854, 855; *Bissel v. Bozman*, 2 Dev. Eq. Rep. 163. Particular charges must be answered particularly and precisely. A general answer, even when it includes an answer to all the particular charges, is insufficient.—*Wharton v. Wharton*, 2 Sim. & Stuart, 235.

As the answer does not pretend that the defendant was a *dormant* partner, nor that notice of any dissolution of the partnership was ever given, we hold it to be clear, that no dissolution of the partnership was effected by the relinquish-

ment made, in 1839, by the defendant to Watson, as it respects third persons who had no notice of such relinquishment; and that the partnership continued after such relinquishment as before, as it respects all such third persons.—*Lucas v. Bank of Darien*, 2 Stew. Rep. 280; *Mauldin v. Br. B'k at Mobile*, 2 Ala. 502; *Goddard v. Pratt*, 16 Pick. R. 412.

Our opinion is, that from a proper construction of the bill and answer, the fair conclusion is, that the complainants have the right to treat the defendant as a partner in said company, and to hold him to the responsibilities of such partner.

The bill states (among other things), "that at the time the said agreements A and C were entered into between the said company and the said Grigg and Hardin, the said company held a claim on the said lands mentioned in said exhibits A and C, by virtue of a contract made with the chiefs of the said Creek Indians, known and generally called the Big Contract"; * * * "that because of said agreements, the said company, under the circumstances, were bound in equity to obtain, if they could, with reasonable diligence, a patent for the lands named in said agreements, and to so arrange it that the same should enure to the benefit of your orators and oratrix, sub-purchasers under the said Grigg and Hardin as aforesaid." The bill also states, that the defendant procured the patent to be issued to himself, and that he has sued the complainants for the lands.

The defendant, in his answer, admits "that it may be true that, by virtue of the 'Big Contract', the said James C. Watson & Co. had a claim upon said lands mentioned in said exhibits A and C; but this defendant, not having access to a list of the lands embraced in the said 'Big Contract', cannot now remember whether the said lands mentioned in said exhibits A and C are included in said list or not, and therefore cannot state what claim, if any, the said James C. Watson & Co. held upon said lands at the time the said agreements were entered into. This defendant's best recollection, however, is, that the said James C. Watson & Co. did, at one time, assert a claim to said lands, but that said claim was never established and approved, as required by the treaty of 1832."

There is nothing else in the answer which amounts even to

an intimation, that the lands mentioned in exhibits A and C were not embraced in the 'Big Contract'; and the question is, whether the part of the answer last above copied puts the plaintiffs upon proof that said lands were embraced in that contract.

We must bear in mind, that we have already ascertained that the defendant must be regarded as a partner in said company, for all the purposes of this case. Regarding him as a partner, it must be presumed, in the absence of his statement to the contrary, that he had a *belief* either that the said lands were included in the 'Big Contract', or that they were not included therein; and that, if he had made any attempt to obtain access to the list of the lands embraced in the 'Big Contract', referred to in his answer, he could have obtained such access. He does not say that he has made any attempt to obtain such access, nor does he say that he does not *believe* the lands in controversy were not embraced by the 'Big Contract.' He says "it may be true" they were embraced in it, but, "*not having* access to a list of the lands embraced" in it, "he cannot *now remember*" whether they were "included in *said list* or not, and *therefore* cannot state what claim, if any", the company held on said lands. His best recollection, however, is, that the company did, at one time, assert a claim to said lands; and he seems careful not to say that the company ever asserted any claim other than under the 'Big Contract.' It was his duty, as a partner, to examine the list alluded to, before answering, or, at least, to have attempted to obtain access to it; and, if he failed to obtain it, to state the failure in his answer.—*Earl of Glengall v. Frazer*, 2 Hare, 90; *Story's Eq. Pl. § 855 a.* It was his duty, if he did not *believe* the said lands were included in the 'Big Contract', to say he he did not *believe* they were included in it. He has not done so; and we feel bound to interpret his answer, in this respect, as an admission on his part that he did not mean to put in issue, as a matter of controversy in this cause, whether said company claimed said lands under the 'Big Contract', nor to ask for proof of the truth of the allegation of the bill, that the company, at the time the agreements A and C were executed, claimed said lands under the 'Big Contract.'—*Brooks v. Byam*, 1 *Story's Rep.* 296; *Story's Eq. Pl. § 868 b*, note 2.

Under the bill and answer, as we understand them, the defendant cannot be permitted to prove, in bar of the relief sought by complainants, that the lands in controversy were not in fact embraced in the 'Big Contract;' because in his answer he has failed to set up such defence, or to put such matter in issue; and has also failed to deny that the company, at the time the agreements show in exhibits A and C were executed, claimed the lands under the 'Big Contract', and by such claim induced Grigg and Hardin to enter into those agreements.—McFerren v. Taylor, 3 Cranch, 270.

Upon the case as presented by the bill and answer, the defendant must be regarded as a partner in said company at the time the agreements A and C attached as exhibits to the bill were made, and the lands mentioned in said agreements must be regarded as embraced in the 'Big Contract.'

The defendant attaches, as exhibit A to his answer, a copy of an agreement executed on the 20th January, 1840, by the original partners in said company, appointing James C. Watson trustee for said company, and conferring upon him certain authority as therein shown; and thereupon the defendant states, that he "*is advised and believes* that the said James C. Watson had no power and authority to sell, dispose of; or convey any land, so as to bind the members of said company, except those lands which might be *patented to the said James C. Watson & Co., or to the said James C. Watson as trustee of said company*; and that the contracts of purchase made with the said Grigg and Hardin are not binding upon the members of said company;" and "that the said James C. Watson was not authorized to sell the land specified in said agreements" A and C attached to the bill.

It is unnecessary now to decide, whether or not, in this particular, the defendant was correctly "advised", or whether his belief, founded on such advice, is correct. For, conceding that *the agreement of the 20th January, 1840*, did not authorize Watson to sell the lands in controversy, nor any land, until a patent for it had issued, nor to enter into the agreements with Grigg and Hardin shown in exhibits A and C attached to the bill; yet, as the defendant is to be treated as a partner in said company, and the lands in controversy are to be treated as embraced in the 'Big Contract', and as

Watson entered into said agreements A and C attached to the bill in the name of the company, and signed the firm name to them, it is sufficient to establish those agreements as the agreements of the company, and binding upon it as such, to prove that Watson had a prior *verbal* authority to execute them, or that they had been subsequently *verbally* ratified by the members of the company.—Herbert v. Hanrick, 16 Ala. Rep. 581; Worrall v. Mann, 1 Selden's Rep. 240; Collyer on Partn. § 467. The legal and unexceptionable evidence in the cause convinces us that he had such prior verbal authority, and that there has been such subsequent verbal ratification.

There is no ground for suppressing the depositions of Peter C. Harris and Littleberry Strange. The exception taken by defendant to the answers of said Harris and Strange, to the 4th and 6th direct interrogatories, is founded on the assumption that Watson had no authority except such as was in writing, and shown in the agreement of the 20th January, 1840. This assumption is not proved nor warranted by the evidence. And, as a previous *verbal* authority was sufficient, it certainly was competent for the complainants to prove by Harris and Strange, who were partners in said company, that Watson had authority to enter into the agreements on which complainants rely. The chancellor erred in sustaining the exceptions relating to these answers of Harris and Strange.

We have now noticed what we consider the most material questions decided by the chancellor; and as to them we think he has erred. We will not extend this opinion by noticing the other questions decided by him; but, out of abundant caution, shall leave them as open if they had not been decided at all. For the errors committed on the points hereinabove considered, and on which the conclusions of the chancellor are in conflict with those above expressed by us, his decree is reversed, and the cause remanded, at the costs of the appellee.

IRONS vs. REYNOLDS.

[TRIAL OF RIGHT OF PROPERTY IN SLAVE BETWEEN PLAINTIFF IN ATTACHMENT
AND WIFE OF DEFENDANT IN ATTACHMENT.]

1. *Wife's right to slave purchased by husband, in his own name, with money belonging to her separate estate.*—If the husband purchase a slave in his own name, and take the bill of sale to himself, the legal title vests in him, although the purchase money was the proceeds of the sale of property in another State secured to the wife by antenuptial agreement there executed; and though he may deliver the slave to the wife, and recognize it as hers, yet she cannot interpose a claim at law, in her own name, when the slave is taken under attachment against the husband.

APPEAL from the Circuit Court of Washington.

Tried before the Hon. ANDREW B. MOORE.

HENRY L. REYNOLDS, the appellee, commenced a suit against James Irons by original attachment, which was levied on a slave woman named Patsey, to whom a claim was interposed by Mrs. Catherine Irons, the appellant, who is the wife of the defendant in attachment. On the trial of the right of property, at the March term, 1855, the following bill of exceptions was sealed, at the instance of the claimant.

"This was a case of original attachment, which issued in September, 1854, at the suit of the plaintiff against James Irons, for his individual debts, not contracted for necessary family supplies; which was levied on several pieces of property, among which was a female slave named Patsey, claimed by Mrs. Irons as her property. Upon the trial of the cause, the plaintiff proved, by the sheriff of the county who made the levy, that he found said slave at the house of James Irons, who lived in the same house with the claimant as husband and wife; and that he levied the attachment on said slave. The plaintiff proved, also, by Richard F. Vaughn, that the said Irons and his wife came to this county, to reside, in the spring of 1853, bringing the said slave with them; and that said slave continued to reside in the house of said Irons and wife, up to the date of the aforesaid levy. The defendant introduced a marriage contract between said Irons and wife,

which was admitted without objection; and read the deposition of Mrs. S. Maxwell, without objection. She proved, also, by Edward P. Irons, that the said slave had been purchased by said James Irons, with the money of said Catherine Irons, and delivered to her as her separate property, taking the bill of sale in his own name; that the said Catherine, when the knowledge of this fact came to her, objected to the manner in which the bill of sale had been taken, saying, that as the slave had been purchased for her, with her own money, the bill of sale should have been taken in her name, and not in the name of the said James; that this was said in the presence of the said James, her husband, without objection or contradiction on his part. It was proved, also, by this same witness, that the said Catherine, living in the same house with her said husband, was in possession of said slave, from the time of the delivery aforesaid to the date of the levy, claiming title in the same, and exercising ownership and control over her. The said slave was purchased and delivered in the city of Mobile, in the spring of 1853.

"Under this state of facts, the counsel for the claimant requested the court to charge the jury, —

"1. That, if they believe that the slave in controversy was purchased by James Irons, with the money of the claimant, and that the possession of the slave was delivered by said Irons to the claimant, then she is the property of the claimant, although the bill of sale was taken in the name of the said Irons, and no deed of gift was executed.

"2. That, although the jury may believe the said slave to have been purchased with the money of the said Irons, yet, if they believe that the said slave was given to the claimant, to be held by her as her separate property, and that the possession of the slave was delivered by the said Irons to the claimant, and that this was done at a time when the said Irons was not indebted, and was not done with a view to hinder, delay, or defraud creditors, — the slave is the property of the claimant.

"The court declined to give either of these charges, and charged the jury, there being no controversy as to the evidence, to find for the plaintiff. The counsel for the defend-

ant requested the court to sign and seal this bill of exceptions, which was accordingly done," &c.

No errors are assigned on the record.

R. SEMMES, for the appellant, made these points:

1. The fact is not controverted, that the money with which the slave was purchased was the proceeds of property which belonged to the wife at the time of the marriage; and it is not pretended that she ever relinquished her claim to this money, in favor of her husband. If such relinquishment had been set up, since a married woman cannot be bound by implication, it would have been necessary to adduce positive proof of it.—*Forrest v. Robinson*, 4 Porter, 44; 1 Dess. 181; 2 Story's Equity, 626. The parties were married in Ohio, where, in the absence of proof to the contrary, the common law will be presumed to prevail; and the wife's property, at the time of her marriage, consisted of real estate and insurance stocks. The husband, then, on his marriage, became entitled to the rents and profits of the real estate; but the title to the stocks, being choses in action, did not vest in him, until he reduced them to possession, either by selling them, or by causing them to be transferred to his own name on the books of the company; neither of which things is shown to have been done.—*Miles v. Williams*, 1 P. Wms. 249; *Mitchell v. Hughes*, 6 Bing. 689; 2 Kent's Com. 138. When the parties removed to this State in January, 1853, the real estate was sold, and the proceeds were transmitted to the husband for and on account of the wife; but this conversion did not take place until after the parties had become domiciled in this State.

2. When the parties removed to this State, the property brought with them came under the provisions of our statute law, which abolishes the common-law doctrine as to the husband's marital rights, and raises no presumption that property brought here by husband and wife belongs to the husband rather than to the wife. Although the bill of sale was taken in the name of the husband, the delivery of possession to the wife invested her with the legal title.—*Pond v. Wadsworth*, 24 Ala. 513.

3. If the wife had entirely failed to establish her claim to the purchase money, yet, as there was some evidence of a

parol gift by the husband to her, the court erred in withdrawing from the jury the consideration of that question.

K. B. SEWALL, *contra*, contended,—1. That the bill of exceptions shows nothing on which this court can act. 2. That the claimant, even if the slave were her separate property, could not interpose a claim in her own name; that, if the separate estate was created by deed, the trustee was the proper party to interpose; if he refused, the only remedy was in chancery; and if the separate estate was claimed under the Code, the legal title was vested in the husband.—Code, § 1983; Bridges & Co. v. Phillips, 25 Ala. 136; Love v. Graham, *ib.* 193; Crabb's Adm'r v. Thomas, 25 *ib.* 212.

CHILTON, C. J.—Without stopping to inquire whether the points attempted to be raised upon the bill of exceptions are properly raised by it, it is sufficient to observe, that the record presents the anomalous case of a proceeding *by a married woman, in her own name, in a court of law*, to try the right to property in a slave, which her husband purchased and took a bill of sale for in his name, but with money which was the proceeds of property secured by an antenuptial contract entered into between them in the State of Ohio; the husband having delivered the slave to his wife, and having recognized her right to the same. Whether, with respect to property which the statute secures to the separate use of married women, they can thus become parties in a court of law, it is not necessary that we should now inquire; see, however, Gerald v. McKenzie, 27 Ala. We know of no statute authorizing her thus to litigate in her own name, and try the right to property situated as this is, in a court of law. No one would contend, for a moment, that the common law admits of such procedure. The law requires that she must put in her claim by a trustee, who has the legal title, and who therefore may well be a party in a court of law. If she has no trustee, or, having one, he refuses to put in a claim and thus to protect her rights, the court of equity will afford her ample redress, for the reason that at law she is remediless.—Bridges & Co. v. Phillips, 25 Ala. Rep. 136; Love v. Graham, *ib.* 187–193; Crabb's Adm'r v. Thomas, *ib.* 216.

It is clear from the facts stated in the bill of exceptions, and about which there was no controversy, that, *at law*, the husband of the appellant was the owner of the property in controversy. He purchased and took the bill of sale to himself. His conduct, acts, or declarations, could not vest the legal interest in his wife, nor invest her with a capacity to become a suitor in a court of law to protect it. Equity can look to such transactions; but the courts of law, pending the existence of the relation of husband and wife, cannot regard them.—*Gamble v. Gamble*, 11 Ala. Rep. 966; *Machen v. Machen*, 15 *ib.* 373; *Frierson v. Frierson*, 21 *ib.* 555; *Jenkins v. McConico*, 26 *ib.* 242.

Such being our view of this case, it follows that the court did right in charging that the property was subject to the plaintiff's execution against the husband, and in refusing the charges asked by the counsel for the claimant.

Let the judgment be affirmed.

ELMORE ET AL. vs. MUSTIN.

[DETINUE FOR SEVERAL SLAVES BY INFANTS CLAIMING UNDER DEED OF GIFT AGAINST ADMINISTRATOR OF DONOR.]

1. *Instrument held a deed, and not a will.*—A writing under seal, in form a deed, by which a father, in consideration of natural love and affection, conveyed to his daughter and her children, by present words of gift, several negroes and other personal property, contained this clause, "The condition of the above-named gift is to take place at my death; until then, the property is to remain as my own": *Held*, that the instrument was a deed, and not a will.
2. *Construction of deed of gift.*—A father conveyed certain negroes and other personal property, by deed of gift, to his "daughter Sarah, and to her children, the natural heirs of her body, at her death", "to have and to hold unto the said Sarah, her executors and administrators forever, as her and her children's property"; and the deed reserved the use and possession of the property to the donor during his life: *Held*, that the deed created a life estate in the said Sarah, with a *quasi* contingent remainder to such of her children as might be living at her death.
3. *Reversal on account of erroneous charge, notwithstanding deficiencies in plaintiff's proof.*—Where plaintiffs claim under a deed of gift, which the court errone-

ously holds to confer no title on them, and therefore charges the jury that, on all the evidence, they are not entitled to recover, the judgment will be reversed at their instance, although the bill of exceptions, while purporting to set out all the evidence, does not show that they proved their identity with the donees named in the deed.

APPEAL from the Circuit Court of Pickens.

Tried before the Hon. E. W. PETTUS.

This action was brought by the appellants, infants suing by their next friend, against John W. Mustin, to recover three slaves and some other articles of personal property, which the plaintiffs claimed under a deed of gift from their maternal grandfather, and which were held by the defendant as his administrator. On the trial of the cause, as the bill of exceptions states, the plaintiffs read to the jury, by consent, an agreement of counsel, in these words:

"We hereby agree to go to trial, in the above entitled cause, upon the construction of the paper writing purporting to be a deed of gift from Paul Walters to Sarah Elmore, wife of Charles Elmore, and to her children, as to the right of Elmore to recover, without regard to the character in which said Elmore sues; and any right which said Mustin has, as administrator of said Paul Walters, affecting his creditors, is hereby waived. And it is further admitted, that some of Mrs. Elmore's children were born before, and some after, the 30th day of April, 1845; and that she died before said Paul Walters, her father. It is further agreed, that Willison, a man about twenty-two or twenty-three years of age, is worth \$850, and his hire \$100 per year; Becky, about eighteen or twenty years old, worth \$800, and hire worth \$55 per year; Alfred, a boy nine or ten years old, worth \$675, and hire worth \$30 per year; that these slaves were all in the possession of the defendant at the time of bringing suit; that Alfred is the child of Becky, named in the deed; that Mary, another child of Becky's, about four years old, was given by the will of said Paul Walters to one of his daughters, named Susannah Williams; and that the above slaves went into the possession of the defendant, about 1st January, 1855, as administrator of said Paul Walters, and are so held by him."

The plaintiffs then read in evidence an instrument in writing, entitled "Deed of gift", which was in these words:

Elmore et al. v. Mustin.

"Pickens County,) Know all men, by these presents,
 Alabama.) that I, Paul Walters, of the said county
 and State of Alabama, farmer, for and in consideration of the
 natural love and affection which I bear unto my youngest
 daughter, Sarah M. Elmore, wife of Charles Elmore, (and) in
 consideration of the sum of one dollar to me in hand paid by
 my said daughter, at and before the sealing and delivery
 hereof, the receipt whereof I do hereby acknowledge, have
 given, granted, bargained, and sold, and by these presents do
 give, grant, bargain, and sell, unto my said daughter, Sarah
 Elmore, the following named property, and to her children,
 the natural heirs of her body, at her death—namely: One
 negro man named Willison, likewise one negro woman named
 Becky, and her child Alfred, likewise one cross-cut saw, one
 large trunk, two yokes of steers, one new Jersey wagon, fifty
 dollars in money, one rifle-gun, and shot-gun; to have and to
 hold all and singular the above named property, hereby given
 and granted, unto the said Sarah Elmore, my daughter, her
 executors and administrators forever, as her and her children's
 property. The condition of the above named gift is to
 take place at my death; until then, the property is to remain
 as my own. In witness whereof, I have hereunto set my
 hand and seal, this April 30th day, in the year of our Lord
 1845." his

"Test: John D. Ballard,) "Paul X Walters. [L. S.]
 John Carver.") mark.

This writing was admitted to record, in the proper office
 in Pickens county, on the 9th June, 1845, on proof by one of
 the subscribing witnesses of its execution; and the bill of ex-
 ceptions states that it was admitted to have been duly execu-
 ted, proven, and recorded.

"A paper, purporting to be the last will and testament of
 said Paul Walters, was also, by agreement of counsel, ad-
 mitted and read in evidence", which was dated October 8,
 1852, and by which the testator, after devising and bequeath-
 ing real and personal property to other children and grand-
 children, gives his daughter Sarah two dollars. This will
 also contained a bequest to Susannah Williams of a negro
 child named Mary, and all the testator's stock of cattle,
 "with the exception of the oxen gifted to Sarah Elmore";

and it was admitted to have been duly admitted to probate.

"This was all the testimony in the case; and upon this evidence the court charged the jury, that the writing executed by Paul Walters on the 30th day of April, 1845, and in evidence before them, was an executory devise, and not a deed; and that the plaintiffs, on all the proof, were not entitled to recover in this action." The plaintiffs excepted to this charge, and it is now assigned as error.

S. F. HALE, for the appellants, contended,—

1. That the instrument under which the plaintiffs below claimed is a deed in form, is called a deed by the maker, can operate as a deed, and was manifestly intended so to operate; and although the character of an instrument be equivocal, yet, if its execution is perfected by delivery, the courts, to prevent the maker's intention from being defeated, will hold it to be a deed.—*Golding v. Golding*, 24 Ala. 128.

2. That the deed gave Mrs. Elmore an estate for life, with remainder to her children living at her death, subject to the life estate of the grantor.—*Williamson v. Mason*, 23 Ala. 487.

E. W. PECK, *contra*, made the following points :

1. The alleged deed of gift was properly held a will.—*Dunn and Wife v. Bank of Mobile*, 2 Ala. 152; *Shepherd v. Nabors*, 6 *ib.* 631; *Thompson v. Johnson*, 19 *ib.* 59; *Walker v. Jones*, 23 *ib.* 448; *Golding v. Golding*, 24 *ib.* 122.

2. If said paper be held a deed, and not a will, it created an estate tail in Mrs. Elmore, which, by operation of the statute then in force (*Clay's Digest*, 157, § 37), was turned into a fee; and consequently the plaintiffs have no title.

3. But, if said paper, as a deed, created a life estate in Mrs. Elmore, with remainder to her children, the children *in esse* at the time of its execution took that remainder; and, since the action is brought jointly by the children born before and after the date of the deed, there can be no recovery. Therefore, the charge of the court, though grounded on a wrong reason, is correct.—*Thomas v. Denton*, 15 Ala. 583; *Bell v. Hogan*, 1 *Stew.* 536; *Miller v. Eatman*, 11 Ala. 609.

4. There is no evidence in the record that the plaintiffs are the children of Mrs. Elmore.

5. If the paper be held a deed, and be construed to create a life estate in the donor, remainder to his daughter for life, and remainder over to her children living at her death; or, if it be construed to create a life estate in the daughter, with remainder to her children living at her death, reserving the use and possession to the donor during his life,—in either case, the remainder over to the children can only be sustained as an executory devise.—2 Kent's Com. 352.

GOLDTHWAITE, C. J.—The first question is, whether the instrument made by Paul Walters, in 1845, is a deed or a will. If it was intended to pass a present interest, and has the other requisites essential to its operation as a deed, it will in law be so regarded; while, on the contrary, if the interest was entirely posthumous, then it is a will; if properly executed as such.—*Adams v. Broughton*, 13 Ala. 731; *Golding v. Golding*, 24 *ib.* 122; *Jarman on Wills*, 11. The present instrument is certainly very inartificially drawn; but we think it clear that it was intended by the maker to pass a present interest. This is shown by the language employed, which, in the concluding clause, is susceptible of no other construction. It is, indeed, as strong in this aspect as words can make it. The last clause reads as follows, "The condition of the above named gift is to take effect at my death; until then, the property is to remain as my own." By this, when taken in connection with the words which precede it, we understand that the operation of the gift, so far as possession was concerned, was to be postponed until the death of the donor, up to which time the property was to remain, not his own, but "as" his own. The word "as", in our opinion, is the qualifying word of the clause, and shows that the donor did not intend to hold the property absolutely up to the period to which he had postponed the enjoyment of the interest he had given. We cannot, on any other construction than the one we have given to this clause, reconcile it with the preceding part of the instrument, the words of which so evidently evince the intention to pass a present interest. The language of the condition or proviso is, at least, doubtful; and it would not be in accordance with sound rules of construction, to make the certain and definite yield to the

uncertain and doubtful. The interpretation we have given to the clause in question harmonizes with the other parts of the instrument, and makes it consistent as a whole.

We are aware that what was said by Collier, C. J., in *Dunn v. Bank of Mobile*, 2 Ala. 152, and the decision in *Shepherd v. Nabors*, 6 Ala. 631, are opposed to the conclusion to which we have arrived; but the result in the first case would have been the same, had the instrument been declared a will; and the authority of both is shaken, if not overruled, by the subsequent cases of *Adams v. Broughton*, *supra*, and *Golding v. Golding*, *supra*, both of which sustain the views we have expressed.

As to the interest conveyed: The donor virtually reserves to himself a life interest in the property; and, with this reservation, he gives it to Sarah M. Elmore, "and to her children, the natural heirs of her body, at her death." The interest of Mrs. Elmore is not, as has been urged, converted into an absolute gift, on the principle applicable to estates tail; for the word "children" is here explanatory, and restrictive of the words immediately following it, and presents a stronger case than *Dunn v. Davis*, 12 Ala. 135, where the gift was to the "heirs or children."

Sarah M. Elmore therefore taking but a life interest, the question then is, whether the remainder was to her children living at the time of the gift, or to her children living at her death. The gift, it is to be observed, is to Mrs. Sarah M. Elmore for life, and "to her children, the natural heirs of her body"; and we think that, by the terms "natural heirs of her body", taken in connection with the word "children", the donor intended to limit the gift to the children who were heirs; and, upon the principle, *nemo est hæres viventis*, the limitation could only extend to the children living at her death, thus giving to them a *quasi* contingent remainder, which we held in *Williamson v. Mason*, 23 Ala. 487, could be created in personal property by deed.

It is said, however, that inasmuch as the record shows there was no evidence that the plaintiffs below were the children of Sarah M. Elmore, they were not entitled to recover, and for that reason the case will not be reversed; we are inclined, however, to think that the written agreement

King v. King.

entered into by the counsel, and which appears of record, rested the case entirely upon the construction of the deed; but, had there been no such agreement, we are of opinion, that the ends of justice require a reversal. It is true that the court will not reverse, although an error has been committed, if it can clearly be seen that such error occasions no injury. Neither, as a general rule, will a judgment be reversed, when it is apparent, upon the whole record, that the plaintiff cannot recover. But neither of these rules can properly be extended to the case before us. Had the charge been rested solely on the deficiency of proof as to the character of the plaintiffs, a motion might have been made to offer the necessary evidence on this point, or for a new trial with a view to supply it thereafter. But with the decision of the court, as to the effect of the deed, either motion would have been entirely superfluous. The charge asserted a proposition, which was conclusive of the case in every aspect, and thus virtually forestalled the action of the plaintiffs as to mere deficiencies or omissions of proof, which the party might have remedied, had merely the general charge been given, that upon the evidence no recovery could be had. In this respect, the error, if we were to refuse to reverse, might result in irreparable injury.

Judgment reversed, and cause remanded.

KING vs. KING.

[BILL IN EQUITY FOR DIVORCE ON GROUND OF CRUEL TREATMENT.]

1. *Motion to suppress depositions for defects in commissioner's return.*—A commissioner, appointed to take the deposition of a witness in a chancery cause, has power to administer the necessary oath, and to make a return to the court under whose authority he acts; and where his return embraces the commission, the interrogatories, the caption of the answers, and the certificate, all these together must be looked to in determining whether he performed his duty. A defect in one part of the return, when supplied in another part, is no ground for suppressing the deposition. If the return states that

the deposition was taken pursuant to the commission, it is not essential that it should also state the manner of pursuing the commission. If it states that the witness was "sworn and examined" by the commissioner, "by virtue of a commission" issued out of the court to which the return is made; and the commission and interrogatories returned specify the particular case; and the deposition shows that the witness, at the time he was answering the interrogatories, knew that he was testifying in that particular case,—the presumption is, that the commissioner swore the witness by virtue of that commission, and in the case therein specified.

2. *Confessions of parties admissible but not sufficient evidence.*—Under section 1966 of the Code, by which it is enacted that, in suits for divorce, "no decree can be rendered on the confessions of the parties", the confessions of the parties are not rendered inadmissible, but are only declared insufficient, when they constitute the only evidence of the alleged cause of divorce: a decree may be rendered on such confessions, in connection with proof of conduct and circumstances which tend to confirm them, and to repel the idea of collusion between the parties.
3. *When cruelty of husband, though not without provocation, is ground of divorce.*—Irritability of temper on the part of the husband, producing ungovernable passion, and occasionally ending in acts of personal violence, renders cohabitation unsafe, and is a peril from which the wife is entitled to protection, although she may not have been wholly blameless. When the passions of the husband are shown to be so much beyond his own control, that it is inconsistent with the personal safety of the wife to continue in his society, it is immaterial from what provocation such violence may have originated.
4. *Alimony, amount of.*—Where a divorce is granted to the wife on the ground of cruelty, a sum of money equal to the legal interest on one-third of the value of the husband's real estate, together with a gross sum equal to one-fifth of his personal estate, is not an unreasonable amount for her alimony; there being no children of the marriage to be provided for, and the husband's children by a former marriage having already received advancements.

APPEAL from the Chancery Court of Macon.

Heard before the Hon. A. J. WALKER.

This bill was filed by Mrs. Margaret King, suing by her next friend, to obtain a divorce from her husband, William King, who is the present appellant, on the ground of cruel and inhuman treatment. The parties were married in 1834, and the bill was filed in 1854. There were no children born of the marriage, but the defendant had several children by a former marriage living with him. In his answer to the bill, the defendant denied the alleged acts of violence on his part, and alleged that the complainant's own misconduct and violent temper produced all their family difficulties, that she compelled him to send his children away from home, that she

allowed him to have no peace or comfort, refused to treat him with common civility, called him by abusive names, &c.

The evidence set out in the record is very voluminous, but a statement of it in detail is unnecessary. Many exceptions were taken to the rulings of the chancellor on the evidence, in receiving the confessions and declarations of the party, and in refusing to suppress depositions on account of defects in the commissioner's returns; but these matters require no particular notice. On final hearing, on pleadings and proof, the chancellor granted the prayer of the bill; and, in decreeing alimony to the complainant, declared that she was entitled to an amount equivalent to her dower interest and distributive share under the statute, as if she had survived her husband; and he therefore allowed her, out of the defendant's estate, "a sum of money equal to the legal interest on one-third of the value of the defendant's real estate, as it existed at the commencement of the suit, together with a sum of money equal to one-fifth of his personal estate, choses in action, and money held by or belonging to him." The decree of the chancellor is now assigned for error, together with his rulings on the defendant's exceptions to the complainant's testimony.

CLOPTON & LIGON, for the appellant.

JAS. E. BELSER and GEO. W. GUNN, *contra*.

RICE, J.—We have carefully examined each of the forty-three exceptions, which were taken by the appellant, in the court below, to the testimony offered and relied on by the appellee; and, in arriving at our conclusions upon the issues presented by the pleadings, we have allowed to him all the benefit to which those exceptions entitle him. A notice in detail of them is useless; it is enough for us to state the rules which apply to them, and by which we have been governed in disposing of them.

The rules which govern the taking of depositions in chancery causes, commenced since the Code went into effect, are not in all respects the same as those which govern the taking of depositions in cases at common law. Section 2920 of the Code provides, that testimony in chancery causes must be taken by *interrogatories*, under the rules now in force, or such as may hereafter be adopted.

A commissioner, appointed to take the answers of a witness to interrogatories, in a chancery cause, is invested with power to administer the necessary oath, and to make a return to the court from which he derived his appointment, and under whose authority he acts. When the return embraces the commission, the interrogatories, the caption of the answers, and the certificate, all these together must be looked at in determining whether the commissioner has substantially performed his duty. The caption is as much a part of the return as is the certificate. The return is, *prima facie*, entitled to full faith and credit; and if it shows, by a direct statement, or otherwise, that the deposition was taken pursuant to the commission, and the commission is unobjectionable, and not objected to, the court should, in the absence of proof *aliunde*, overrule any motion to suppress, founded merely on a defect in one part of the return, which is supplied in some other part of the return.—Comstock v. Meek, 7 Ala. R. 528; Olds v. Powell, 7 *ib.* 652; Potier v. Barclay, 15 *ib.* 439; Ulmer v. Anstill, 9 Porter, 157; Glover v. Millings, 2 Stew. & Por. 28. Thus, a defect in the certificate, which is supplied in the caption, is no ground for suppressing a deposition in a chancery cause.

If the return states that the deposition was taken pursuant to the commission, it is not essential that it should also state *the manner* of pursuing the commission. If it states that the witness was "sworn and examined" by the commissioner, "by virtue of a commission" issued out of the chancery court of Macon county; and such a commission, with the interrogatories and answers, is returned to that court; and the commission and interrogatories specify the particular case in which they were put forth; and the deposition shows that the witness knew, at the time he was answering the interrogatories, that he was testifying in that particular case,—the presumption is, that the commissioner swore the witness, by virtue of that commission, and in the case therein specified.—Olds v. Powell, and other cases, *supra*.

The cases of Richardson v. Richardson, 4 Porter, 467, and Moyler v. Moyler, 11 Ala. Rep. 624, were decided under the influence of the 4th section of the act of 1824, in relation to the confessions of the parties in suits for divorces, which was

in the following words: "In order to prevent collusion between the parties, in no case shall the confession of them, or either of them, *be taken or received as evidence*, in any case of divorce."—Clay's Dig. 171, § 16.

But the Code repealed that section, and substituted for it, in section 1966, the following provision: "No decree can be rendered on the confession of the parties, or either of them."

The distinction between the *admissibility* and the *sufficiency* of evidence is well known; and that is the very distinction taken and maintained in the provision of the Code above quoted. The act of 1824 made the confessions *inadmissible* as evidence. The Code makes them *insufficient*, but does not absolutely exclude them. It makes them *admissible*, but forbids the rendition of a decree for divorce, when they constitute the only evidence of the alleged cause for divorce. It does not, however, forbid the rendition of such decree when they do not constitute the only evidence, but are proved in conjunction with other circumstances and conduct, which confirm or tend to confirm them, and repel the idea of collusion between the parties. A decree for divorce, rendered on confessions, *and conduct, and circumstances*, is not a decree "rendered on the confession of the parties", within the meaning of the Code.—Shelford on Marriage and Divorce, 411; Mortimer v. Mortimer, 2 Hagg. Cons. R. 316; Williams v. Williams, 1 *ib.* 304; Harris v. Harris, 2 Hagg. Eccl. R. 376; Morgan v. The State, 11 Ala. R. 289; Bell v. Rhea, 1 *ib.* 83.

The provision of the Code above quoted, was designed to guard against collusion between the husband and the wife. Whilst, therefore, it allows their confessions to be received, it denies *credit* to them, whenever they are unsupported. It is, in substance, the adoption of the 105th of the ecclesiastical canons of 1603, "that in all proceedings in divorce and nullities of matrimony, good circumspection and advice be used, and that the truth may (as far as possible) be sifted out by the deposition of witnesses, and other lawful proofs and evictions, and that *credit* be not given to *the sole confession* of the parties themselves, either within or without the court."—Shelford on Mar. and Divorce, 411, and note (i).

Disregarding all the evidence the consideration of which is not justified by the views and rules above expressed, there

is sufficient testimony, of unexceptionable character, to entitle the wife to the protection of the law, and to the decree rendered in her favor by the chancellor. The main features of the alleged cruelty are, irritability of temper, producing ungovernable passion, ending occasionally in acts of personal violence, and of course attended with the danger of a repetition of personal mischief. The wife is not without blame; but enough is not proved to justify the ferocity of the husband. The decree for divorce is fully sustained by the following authorities: Holden v. Holden, 1 Hagg. Cons. R. 453; Westmeath v. Westmeath, 2 Hagg. Eccl. R. Suppl. 73, 238; Shelf. on Mar. and Divorce, 429 to 435; Hughes v. Hughes, 19 Ala. R. 307; David v. David, 27 *ib.* 222.

The ground upon which a divorce was denied to the wife in David v. David, *supra*, was, that she, by her own misconduct, had brought upon herself the ill treatment of which she complained; and that it was not wholly out of proportion to her offence, nor without excuse, when considered with reference to the provocation. But, in the present case, the failings of the wife have been inordinately resented, and visited with intemperate violence and inexcusable harshness. When the passions of the husband are thus shown to be so much out of his own control, that it is inconsistent with the personal safety of the wife to continue in his society, it is immaterial from what provocation such violence originated. Such a tendency to bodily mischief renders cohabitation unsafe, and is a peril from which the wife is entitled to protection.

The allowance made to the wife by the chancellor, on granting her a divorce, is justified by the evidence, under the provisions of our law.—Code, §§ 1971, 1972.

On this appeal, we shall not decide again the matters which were decided in awarding the *mandamus* to Chancellor Clark on the application of the appellee at the last term. We allude to the decision made on that application merely to state that the matters embraced by it are distinct, and must be kept distinct, from the matters embraced by this appeal.

The decree of Chancellor Walker, granting the divorce to the appellee, and determining her allowance under the provisions of sections 1971 and 1972 of the Code, is in all things affirmed, at the costs of the appellant.

POLLARD ET AL. vs. MADDUX.

[TRESPASS QUARE CLAUSUM FREGIT TO RECOVER DAMAGES FOR OPENING RAILROAD THROUGH PLAINTIFF'S LANDS.]

1. *Right of way assignable by railroad company.*—The Montgomery Railroad Company having made an assignment of its road and all its effects, which was held valid by this court in *Allen v. Montgomery Railroad Co.*, 11 Ala. 437, the purchasers at the trustees' sale, who were afterwards incorporated under a new name, acquired and succeeded to all the rights which the old company had under a deed conveying the right of way for the construction of the road.
2. *Contracts construed by aid of surrounding circumstances.*—In the construction of a written contract, the court must place itself in the situation of the contracting parties at the time of its execution, and look at the occasion which gave rise to it, the relative position of the parties, and their obvious design as to the objects to be accomplished; but if the meaning and intention of the parties cannot be ascertained from the language of the instrument, when thus illustrated, it is void for uncertainty.
3. *Uncertainty in deed.*—The owners of lands through which a railroad, then in process of construction, would probably pass, joined in a sealed instrument, by which, in consideration of one dollar in hand paid, they bargained, sold and conveyed to the railroad company, in present words, "so much of any part of our (their) lands as may be necessary in the construction of said railroad": *Held*, that the instrument, though it might not operate as a conveyance in fee of the land necessary for the construction of the road, was not void for uncertainty, but was binding as a covenant that the company might appropriate so much of any part of the grantors' lands as might be necessary for the construction of the contemplated railroad.
4. *Estoppel under covenant and by acts in pais.*—The owner of lands through which a railroad passed, having previously granted the right of way to the company, was apprised when the agents of the company entered on his land to open the road, and knew that they claimed the right under his deed, but raised no objection, and took a contract for supplying the company with a portion of the materials used in the construction of the road: *Held*, that he was estopped from afterwards bringing trespass against the members of the company, although the instrument by which he conveyed the right of way might be inoperative as a deed.

APPEAL from the Circuit Court of Macon.

Tried before the Hon. ROBERT DOUGHERTY.

This action was brought by James Maddox, against the appellants, to recover damages for entering upon certain lands in Chambers county, cutting down the trees, digging

up the soil, &c. The defendants pleaded separately, in short by consent, not guilty, with leave to give in evidence any special matter in bar of the action. The plaintiff having died, the suit was revived in the name of his executrix, who is the present plaintiff. The bill of exceptions, which presents all the matters now assigned as error, shows that the defendants justified under a deed executed by said Maddox, with others, in 1835, conveying the right of way through his lands to the old Montgomery Railroad Company; but the court held this deed void for uncertainty. The opinion contains a full statement of all the material facts of the case.

HENRY C. SEMPLE, for the appellants :

The questions arising on the record are two : 1. Was not the deed of Maddox to the Montgomery Railroad Company a valid conveyance? and, if so, could not that company convey to others? 2. If the deed was not valid as a conveyance, still, does not the conduct of Maddox, in permitting the company to build their road on his land, under a claim of authority from him, without making any objection, but on the contrary assisting them, operate as a license to them to build their road on his land?

1. A deed is always operative, if the court, by placing itself in the situation of the grantor at the time of its execution, with a knowledge of surrounding circumstances, and of the force and import of the words used, can ascertain his meaning from the language of the instrument thus illustrated.—1 Greenl. Ev. § 300, and cases cited; 4 Greenl. Cruise, 246, § 24. The fact of the dissolution of a corporation only operates a reversion to the grantor of the lands which then remain the property of the corporation.—Angell & Ames on Corporations, § 195; State v. Rives, 5 Iredell's Law R. 305-9.

2. A silent assent to a claim to land, by a permission to the party making it to erect valuable improvements, with a full knowledge that the claim is stated at the time to be derived from the owner, under an instrument which is susceptible of a construction as a conveyance or license, will operate as a new license to the party constructing the improvements. To hold otherwise, would operate a fraud on the party making the improvements.—1 Greenleaf's R. 117;

9 Johns. 35, and cases there cited for plaintiff in error. There appears to have been no revocation of the license until suit brought, and no act was done by the defendants without the sanction of the plaintiff's testator.

JAMES E. BELSER, *contra*:

1. There is no mutuality in the deed, and it is void for uncertainty. It does not state where the land lies, or in what county, or in what State. The title to land can only pass by deed.—McPherson v. Walters, 16 Ala. 715; Jubber v. Jubber, 9 Simons, 503; Jarman on Wills, vol. 1, pp. 318–19.

2. The license in the deed to use the land, is confined by its terms to the original railroad company; and the right arising out of the license did not pass by the mortgage sale, nor by the deed executed to the purchasers of the road.—Sampson v. Burnside, 13 N. H. 265; 3 Kent's Com. (2d ed.) 452.

3. If the deed was operative only as a license, the license was confined to the original company.—Bridges v. Purcell, 1 Dev. & Bat. Law R. 492.

4. The plaintiff was not estopped from a recovery by the facts shown in the record.—Watkins v. Peck, 13 N. H. 360; Ware v. Cowles, 24 Ala. 446; McPherson v. Walters, 16 *ib.* 716.

CHILTON, C. J.—It appears that the defendants, as the agents, and by direction of the Montgomery and West Point Railroad, a company incorporated by the legislature of this State, had constructed a portion of the road, say a mile and a quarter of it, which runs from Montgomery to West Point, upon the land of the plaintiff, (being the same described in his declaration,) using no more of the soil and timber than was necessary to the erection of said portion or section of said railroad. They justified under a deed executed by the testator and others, whereby, on the 10th November, 1835, after reciting, by way of preamble, that a railroad was about to be established from the town of Montgomery, Alabama, to West Point, or elsewhere on the Chattahoochee River, the said James Maddox of Chambers county, (with others whom it is unnecessary to name,) for and in consideration of one dollar in hand paid by the Montgomery Railroad Company,

"bargains, sells and conveys unto said company so much of any part of his land as shall be necessary in the construction of said road. In testimony whereof", &c.

After the execution of this deed, and after the said road had been commenced, and a portion of it built, the Montgomery Railroad Company resolved to borrow fifty thousand dollars in money, upon bonds, at eight per cent., with interest payable semi-annually, and to execute a mortgage on all its property, real and personal, to secure their payment. This was done, and a mortgage was accordingly executed to Whiting, Taylor and Crommelin, on the 20th Nov., 1839.

On the 6th July, 1842, the trustees in the mortgage deed sold the property, and, by their deed of that date, conveyed said property to Charles T. Pollard and sundry others, the purchasers, in consideration of fifty thousand dollars paid by them, the said Pollard and his associates.

By certain acts of the legislature of this State, recognizing the sale and conveyance to Pollard and his associates, the name of the old corporation is changed, and Pollard and his co-purchasers are invested with all the powers pertaining to the old corporation, under the name of the Montgomery and West Point Railroad Company; they being required to perform certain conditions, which this record says they duly performed.

It appears, further, that James Maddox, the plaintiff, was fully apprised, when the agents of the Montgomery and West Point Railroad entered upon his land to construct the road, that they claimed this right by virtue of the deed from him and others above alluded to; that he raised no objections to their going on with the work, nor gainsayed their right to do so, but, on the contrary, he took a contract from the company to aid them in its construction over his land, by furnishing a large number of cross-ties.

The circuit judge was of opinion, and so instructed the jury, that the deed of Maddox to the company was void for uncertainty, for all purposes, and that said company took no right, interest, or privilege under it, although the defendants may have been fully authorized by the Montgomery and West Point Railroad Company to open said road. The judge further charged, that, although the plaintiff (James Maddox)

lived near the road on which the excavations and embankments were made on his land, while the same were being made, and afterwards furnished cross-ties to the Montgomery and West Point Railroad Company under a contract with said company, still this would not prevent the plaintiff from recovering. He refused to charge, that, if they believed the evidence, they should find for defendants. These rulings present the points for our revision.

That the Montgomery Railroad Company had power to make the mortgage or assignment to Whiting and others, was decided by this court in *Allen v. The Montgomery Railroad Company*, 11 Ala. Rep. 437. The legislature having conferred upon the company the power to pledge or mortgage its effects, track, &c., the right of the mortgagee to make the security available necessarily follows. But this right would be illusory and fruitless, unless the purchaser under a sale or foreclosure could reap the benefit of his purchase; which he could not do, unless he could reap the profits resulting from the use of the road which was purchased by him. It follows, therefore, that Pollard and his associates acquired all the right which the Montgomery Railroad Company could assign; the assignment, as we have said, covering everything that belonged to it, whether real or personal. That the legislature invested them with certain privileges, incorporating them in and reforming the old corporation, or making them a new corporation with the powers of the old, makes no difference, as respects the question before us. They are a corporate body, and possess or succeed to the rights which the Montgomery Railroad had under the contract with the appellee's testator, if that right was assignable, or such as the law will uphold.

Contracts must be interpreted in the light of surrounding circumstances. The occasion which gives rise to them, the relative position of the parties, and their obvious design as to the objects to be accomplished, must be looked at, in order to arrive at their true meaning, and to enable the court to carry out their intention, if lawful. It often happens that parties use very inapt expressions in drafting their instruments; yet their true meaning and intention may be fairly gathered from the instrument, when thus considered. The

court must place itself in the situation of the contracting parties at the time of executing the instrument; and if, with a full understanding of the force and import of the language thus illustrated, the meaning and intention of the contracting parties cannot be ascertained, the instrument is void for uncertainty.—1 Greenl. Ev. § 300; 4 Mass. 205. "Every deed", says Parsons, C. J., in the case just cited, "ought to be so construed, if it can, that the intent of the parties may prevail, and not be defeated."

To make an application of these rules: A railroad was about being constructed from Montgomery to West Point, or elsewhere on the Chattahoochee river. The grantors in this deed owned lands over which it would probably run; but, as it was not certain what land would be covered by the track, they were unable, of course, to specify the particular portions of the soil which should be dedicated to the road. The object of the railroad company was to obtain the right of way—the liberty of appropriating so much of the soil as should be necessary for the construction of the road over the lands of these proprietors. The grantors were willing to contribute to this work of improvement—to grant to the company "so much of any part" of their respective lands as might "be necessary in the construction of said road." They virtually say to the company, "Should your road run over any lands owned by us, enter upon any part of such lands, and use so much of any part as shall be needed for the construction of the road, and the portion so necessarily used we hereby convey to you." There is nothing uncertain in this contract which can affect its validity. The parties have agreed upon the means by which the land is to be ascertained, which is the subject-matter of the grant. The appropriation of the land under the grant was made by the agents of the company, or its assignee, under the immediate inspection of the grantor, who, so far from objecting, aids in the construction of the road, thus giving a practical illustration of his (then) interpretation of the contract.

We will not say that the deed operates as a conveyance in fee of the land necessary to the construction of the road. Taking in the whole scope of the instrument, and the inducement which led to it, as well as the object to be accomplished

by the grant, the location and construction of the railroad, and the benefits accruing therefrom to co-terminous proprietors of land, it may be that the law, in the absence of any express qualification, will imply a termination of the estate, when the object of its creation shall have ceased—that is, when the land shall cease to be occupied as the track of the road. Viewed in this aspect, the grant would confer a title in the nature of a base fee.—Wharton's Conveyancing, pp. 39-40. Be this, however, as it may, it amounts to more than a mere license to occupy, conferred as a personal privilege, and founded in personal confidence. It is a grant to a corporation, which changes its officers, which has expended a large sum of money, under the observation, and without objection from the grantor. It confers not only a license to enter upon and use the land for the erection of the road, but the land itself is granted for the object contemplated, so soon as designated by the appropriation, that being the means provided in the contract for its ascertainment, (2 Ro. 55; Hobart, 174); and, whether this grant be absolute or conditional, makes no difference, since, in either aspect, the interest of the company might be transferred under the tenth section of its charter, or by the general law aside from such provision in the law of its organization.

The question as to the nature of the estate conveyed in the land itself, is not necessarily involved in the record before us; for the deed may be invalid as a grant of the land, and yet operate as a covenant to stand seized to the use of the road.—Wille's Rep. 682; 2 Wm. Saund. Rep. 96 a, n. 1; 1 Pres. Abs. Tit. 313; Broom's Legal Maxims, 415, 416, mar. p.; 15 M. & W. 769. But, viewed in any aspect in which we have considered it,—whether as an executory conveyance, to become perfect when the subject-matter should be ascertained by the location and construction of the road, and then to take effect by relation back to the time of its execution, or in the nature of a base or conditional fee, or as a covenant to stand seized to the use of the company for the purposes of the road, —*ut res valeat*, one thing is exceedingly clear; that is, conceding the deed to be void for uncertainty as a grant, no particular land being described in it, it is binding as a covenant that the company may appropriate so much of any portion of

the land of the grantor as should be necessary to the construction of the contemplated railroad; and the company having expended their money and labor upon the faith of it, by the acquiescence of the grantor, and having constructed the road as therein provided, so that they cannot be placed in *statu quo*, the covenant operates as a complete estoppel of the grantor to say that he has a claim for damages by reason of the appropriation of the land as contemplated by his solemn agreement. It would be to sanction a gross fraud, to allow a party to treat as a trespass, and recover damages for, that which by his covenant and conduct he had superinduced.

Let the judgment be reversed, and the cause remanded.

RICE, J., having been of counsel before his election to the bench, did not sit in this case.

DAILY vs. BURKE.

[QUESTION OF PRIORITY BETWEEN JUDGMENT CREDITORS.]

1. *Construction of 12th section of Code.*—The term "proceeding", as used in the 12th section of the Code, which declares that "no action, or proceeding", commenced before its adoption, shall be affected by any of its provisions, does not include a judgment, which is an entire act,—an act which cannot, in any proper sense, be said to be "commenced" before a certain day.
2. *Lien of judgments on land.*—The provision of the Code (§ 2456), which makes a judgment a lien on the real estate of the debtor only from the time of the delivery of an execution to the sheriff, applies to judgments rendered before its adoption.

APPEAL from the Circuit Court of Tuscaloosa.

Tried before the Hon. GEO. D. SHORTRIDGE.

The sheriff of Tuscaloosa county having applied to the circuit court for instructions how to apply certain moneys in his hands, the proceeds of the sale of lands levied on as the property of James M. Dunlap, by virtue of two executions, one in

favor of Thomas J. Burke, which was issued on a judgment rendered on the 25th September, 1850, and the other in favor of Robert Daily, by his next friend, which was issued on a judgment rendered on the 1st October, 1853; thereupon came the said Burke and Daily, by their attorneys, and each claimed the money. "The attorney of said Burke proved to the court, that he recovered a judgment against said Dunlap, in the year 1850, at the September term of the circuit court of said county; that he caused an execution to be issued on his said judgment, within the year and a day after said judgment was rendered, which went into the sheriff's hands, and was by him returned 'no property found'; that no other execution was issued on said judgment, until the 15th day of January, 1855, which was received by the sheriff of the county on the next day. The attorney of Robert Daily, by his next friend, proved that he recovered judgment against said Dunlap, at the October term of said court, 1853; that an execution was issued on said judgment, within the year and a day, and went into the hands of the sheriff of said county, and was by him returned no property found; that he caused an *alias* execution to be issued on his said judgment, on the 2d day of November, 1854, which went into the hands of said sheriff on the same day. It was further proved that the executions of said Burke and Daily were both levied on the lands of said defendant in execution, which were duly sold for the money mentioned in the said sheriff's motion." "On this evidence, the court decided that the said Burke was entitled to said money in the hands of the sheriff, and that his judgment was a lien on said lands up to the said sale." Daily excepted to this decision of the court, and he now assigns it as error.

E. W. PECK, for the appellant:—The lien of Burke's judgment on Dunlap's land was lost by the adoption of the Code. The acts of 1807 and 1812, by which such liens were created, were repealed by the Code.—Stephenson v. Doe, 8 Blackf. 508; 5 English, 588; Code, §§ 10, 2422, 2456. These acts being repealed, the Code alone must be looked to, to determine the rights of the parties; and by it the appellant's claim is superior to that of the appellee.

ORMOND & NICOLSON, *contra*:—1. Burke, having issued execution within the year and day, was not bound to keep it up from term to term, in order to make the lien of his judgment effectual on the lands of the defendant in execution. It was enough that he had a subsisting judgment and execution in the sheriff's hands at the time of the sale of the land.—Turner v. Lawrence, 11 Ala. 426.

2. Judgments, obtained since the adoption of the Code, are not liens on real or personal estate: to constitute a lien, there must be an execution in the hands of the sheriff. But this applies only to judgments obtained since the adoption of the Code, and not to those previously rendered. What was the intention of the framers of the Code, in this regard, and how far have they respected former judgments? was it intended that they should be put upon the same footing with judgments since obtained? Section 2419 provides the rule as to the issue of executions, and the time within which a *scire facias* is necessary to revive them; and the term of prescription, as to all judgments obtained under the Code, is ten years. But section 2420 excepts existing judgments from this prescription, and the next section gives them twenty years. The Code thus not only recognizes existing judgments, but puts them upon higher ground than those obtained since its adoption. If authority be thus given to issue an execution on an existing judgment after the lapse of ten years, to what does this refer itself? Does it not refer back to the judgment as it was at the time of its rendition, and when it was a lien on lands? The title by which they are designated, "existing judgments", is a recognition of their legal efficacy, for their very existence could only be by virtue of the former law. As to the relation of execution and judgment, see Conard v. Atlantic Insurance Co., 1 Peters, 386, 443.

Again, the 12th section of the Code declares, that "no action, or proceeding", commenced before its adoption, is affected by its provisions. The appellee had taken all the steps necessary to effectuate his lien on the lands of his debtor, and his rights had become perfect under the old law. The term "proceeding" is one of the largest legal signification, and implies not only all means by which the primary power of the law may be set in motion, but all the interme-

mediate steps between the initiation and termination of a cause in court.—*Amis v. Smith*, 16 Peters, 313; *Webster's Dictionary*.

As to the effect of repealing statutes, and the hesitancy of courts to give them a retroactive operation, see 5 Hill, 221; 1 Kent's Com. 463. As to the effect of subsequent enactments on past judgments, see 7 How. 760; 7 Johns. 478; 12 Barb. 585; 13 B. Mon. 19.

GOLDTHWAITE, C. J.—By the old law, a judgment was a lien upon the lands of the defendant; but by section 2456 of the Code, lands are placed upon the same footing with personal property, and are bound only from the delivery of the execution to the officer. In the present case, the only question is, whether the law of the Code, in this respect, applies to judgments which were rendered before its adoption.

The right of the legislature to exempt lands from the lien of existing judgments, is not questioned; and, as there is an express repealing clause (§ 10) of all acts of a public nature not embraced in the Code, it is clear that the effect of this, standing alone, would be to repeal any previous statute which made judgments a lien upon lands. We do not understand this proposition to be denied; but it is urged, that the effect of the repealing clause is broken by section 12, which provides that "no action, or proceeding, commenced before the adoption of the Code, shall be affected by its provisions"; that a judgment is a proceeding, within the meaning of this section; and that consequently, if rendered before the Code took effect, it is not affected by it. We think, however, that the term, as there used, must be confined to a proceeding that is continuous in its character—pending, and not terminated, when the Code went into operation. The use of the word "commenced" shows, we think, very clearly, that the section referred to was never intended to embrace a judgment, which is an entire act,—an act which could not, in any proper sense, be said to be "commenced" before a certain day.

It may be necessary briefly to notice the argument of the appellee, based upon sections 2419 and 2420 of the Code. The effect of the first of these sections is, to require a *scire facias* to revive a judgment on which an execution has not

been sued out within a year after its rendition, or within ten years after the date of the last execution; and in the last case, the failure to issue the execution, within the prescribed period, is presumptive evidence of the satisfaction of the execution. It is supposed by the counsel for the appellee, that, as judgments existing when the Code took effect are exempted from the operation of this section by the terms of section 2420, such judgments would have the same liens as when rendered; but we cannot admit the sequence. Under the old law (Clay's Digest, 206-7, § 28), the failure to issue execution for ten years, rendered it necessary to revive the judgment, (Van Cleve v. Haworth, 5 Ala.; Collins v. Boyd, 14 Ala. 505); but such failure raised no presumption of payment, except so far as to bar the issue of execution without a *scire facias*; and the main distinction between the law of the Code and the old law, was in the effect which the failure to issue execution had as evidence. The main object of section 2420 was, to secure judgments rendered before the Code took effect, upon which no execution had issued for ten years, against a presumption which attached to judgments rendered since the Code upon the same failure. But it was not intended to go beyond this, and to give to the first class of judgments, when revived, a force and effect superior to that which they would have possessed had they been rendered after the Code went into operation.

Judgment reversed, and cause remanded.

BOYKIN vs. RAIN.

[ACTION UNDER CODE, IN NATURE OF EJECTMENT, TO RECOVER POSSESSION OF LAND.]

1. *Mortgage by husband of wife's land.*—If the husband, during coverture, and after issue born, execute a mortgage of his wife's land, the deed conveys all his interest as husband and tenant by the curtesy initiate.
2. *Acknowledgment by deed of feme covert.*—An acknowledgment by a married woman, on private examination apart from her husband, that she signed,

sealed, and delivered the above instrument, on her own free will and accord, and without any force, persuasion, or threats from her said husband, and for the express purposes therein stated", is not a substantial compliance with the provisions of the statute (Clay's Digest, 155, § 27), which requires an acknowledgment "that she signed, sealed, and delivered" the deed, "as her voluntary act and deed, freely, without any fear, threats, or compulsion of her said husband.

3. *Feme covert, how made defendant to bill.*—When a married woman, a resident of this State, is named as a defendant to a bill, together with her husband and others, and there is no service of subpoena on her husband, as required by the 4th rule of chancery practice, no plea, answer, or demurrer filed by her and her husband, or by either of them, and no order that she might answer or defend separately, or that she might appear by solicitor or in any other manner,—publication against her as a non-resident, and her appearance by solicitor, do not give the court jurisdiction of her person, and the decree is not binding on her.
4. *Decree of divorce, effect of.*—A decree of divorce *a vinculo*, in favor of the wife, defeats and determines all the rights and interest of her husband in and to her lands, and of others claiming under a mortgage executed by him, and restores her rights precisely as her husband's death would have restored them.

APPEAL from the Circuit Court of Washington.

Tried before the Hon. ANDREW B. MOORE.

This action was brought in August, 1854, by James M. Boykin against Daniel Rain, to recover the possession of a certain tract of land, which the plaintiff claimed in right of his wife, together with damages for its detention. The bill of exceptions, sealed at the instance of the plaintiff, is as follows:

"On the trial of this cause, the following facts were proved: That the land in controversy was originally the land of Sarah M. McGrew; that she married Robert F. Hazzard, and had by him one child; that said Hazzard and wife, during the coverture, mortgaged the land to the Life Insurance and Trust Company in Mobile, which mortgage, with the assignment, endorsement, and acknowledgment thereon, is made a part of this bill of exceptions, marked 'A'; that said insurance company assigned said mortgage and land to Joseph Kernochan, which assignment is endorsed on said mortgage; that said mortgage purported to be foreclosed in the chancery court of Mobile, of the proceedings of which foreclosure suit a transcript is hereto attached as a part of this bill of exceptions, marked 'B'; that said Sarah, in the

year 1852, was divorced *a vinculo matrimonii*, on her bill in the chancery court, filed against said Hazzard, which decree was ratified by an act of the legislature of Alabama; that in the same year, and soon after said divorce, she married the present plaintiff, who had one child after said marriage; and that in the year 1853, before this suit, the said Sarah died. It was in evidence, also, that said insurance company bought at the sale made under said Kernochan's foreclosure, and obtained the register's deed to the land in controversy, and conveyed by deed to the present defendant on the 1st December, 1849, of which deed a copy is hereto annexed. It was in evidence, also, that the land was in the possession of the defendant, under his said deed, at the time of the (plaintiff's) said marriage, and so continued during the coverture. It was proved, also, that said Sarah was born in Alabama, and never was out of the State; and that the defendant went into possession, with the knowledge and assent of Mrs. Boykin. The annexed letter from said Sarah to the defendant, dated January 3, 1850, was also proved", which letter contained a proposal to re-purchase the said land.

"Upon this evidence, the court charged the jury, that, upon the facts before them, they must find for the defendant, unless said decree in chancery, and the proceedings to obtain the same, were fraudulent in fact, and obtained with intent to defraud plaintiff and his wife out of said land; that this was the only question for them to consider; that if fraudulent, they must find for the plaintiff, and if not, for the defendant; that if the statements in the transcript were simply erroneous, and consisted only of mistakes, this would not be fraud, but the bill must have been filed and carried on with the object and intent of defrauding. To this charge, and to each part thereof, the plaintiff excepted", and he now assigns it as error.

The mortgage referred to in the bill of exceptions, dated 7th February, 1844, was acknowledged by Mrs. Hazzard before a notary-public, whose certificate, appended to the deed, is in these words: "This is to certify, that Mrs. Sarah M. Hazzard, wife of Robert F. Hazzard, esq., was examined and interrogated by me, privately, and apart from her said husband, Robert F. Hazzard, when she declared that she signed,

sealed, and delivered the above instrument of mortgage deed, on her own free will and accord, and without any force, persuasion, or threats from her said husband, and for the express purposes therein stated. In witness whereof", &c.

The bill to foreclose was filed by said Kernochan on the 1st January, 1846, against said Hazzard and wife and said insurance company as defendants. Publication was ordered against Hazzard and wife, as non-residents, on the affidavit of the complainant's solicitor; and a decree *pro confesso* was entered against "the defendants" on proof of publication. A reference to the master was ordered, to ascertain and report the amount of the mortgage debt; and on the confirmation of his report, a decree of sale was rendered, which was declared to be of no effect, as to Hazzard and wife, until the complainant executed the statutory bond required in case of non-resident defendants. An amended bill was afterwards filed, bringing to the knowledge of the court an alleged mistake in the description of the land contained in the mortgage, and bringing in as defendants several judgment creditors who had levied on the land; and the cause again proceeded to a final decree. The facts shown by the record, on which the questions respecting the validity of these proceedings are predicated, will be readily understood from the briefs and opinion.

JOHN T. TAYLOR, for the appellant:

1. The divorce *a vinculo*, obtained by Mrs. Hazzard, divested all the marital rights of her husband, and of those holding under him, and remitted her to her original ownership.—10 Paige, 420; 10 Conn. 225; 9 *ib.* 541; 10 Mass. 260; 2 Maryland, 429; 9 Vermont, 326; 3 Texas, 336; 1 Tyler, 414; 2 Ashm. 455; Shelford on Divorce, 470; 1 Fonb. 311; Roper on Wills, 71. The plaintiff's subsequent marriage with Mrs. Hazzard, and her death, gave him the use of all her lands for life.—Code, §§ 1982, 1990.

2. The defence is rested on a mortgage, purporting to have been executed by Mr. and Mrs. Hazzard, and its foreclosure in chancery. But these proceedings, it is contended, are void for want of jurisdiction. The transcript of the suit shows two bills and two decrees. In the first bill, it was attempted to make Mrs. Hazzard a defendant by publication, as a non-

resident; and in the second, subpoenas were issued. The court cannot get jurisdiction of the person of a non-resident, except in the mode provided by the statute; and the first requisite of the statute is that an affidavit must be filed, which was not done in this case. Neither was the order or proof of publication sufficient.—6 Barbour, 610; 7 *ib.* 255; 1 Peters, 340; 11 Howard, 437; 12 Ala. R. 122; 6 Monroe, 192; 1 Michigan, 480; 4 Peters, 470; 11 Wendell, 652; 9 Cranch, 64; 1 McLean, 321; 4 Equity Digest, 488, § 20. Besides, Mrs. Hazzard was not a non-resident: she was born and died on the lands in controversy, and never was out of the State. A resident citizen can only be made a party in chancery by service of subpoena.—Code, § —; 4 Peters, 475; 1 Bland, 286; *ib.* 550; 11 Serg. 430. But, admitting that these proceedings are valid, they are entirely against Mrs. *Mary F.* Hazzard, and are of no effect as against Mrs. *Sarah M.* Hazzard, under whom the plaintiff claims.—20 Pick. 439; 2 English, 395.

As to the amended bill, it is not pretended that any subpoena was served. Two writs were issued, but were returned not found; and no affidavit or publication was made. It is true the decree recites that "the parties came", &c., but this is not a general appearance; and it has been expressly decided, by this court and others, that a recital of this kind refers only to the parties who have been served with process. 2 Stewart, 41; 3 *ib.* 331; 6 Pick. 232; 14 Sm. & Mar. 76; 1 Peters, 340. The recitals in the decree as to publication and affidavits are to be disregarded.—10 Barbour, 547; 6 *ib.* 607; 5 *ib.* 48; 6 Pick. R. 246; 4 Monroe, 544; 9 Cranch, 64; 1 McLean, 321; 4 Ala. 249; 21 *ib.* 586. Again, the statute under which this decree was rendered, and the decree itself, declare that it shall be of no force or validity, until the plaintiff gave the bond required; and no bond was ever filed.

3. As to the mortgage, disconnected from the chancery proceedings: The defendant was not in a condition to set it up as an outstanding title.—5 Wendell, 603; 20 *ib.* 260; 6 Hill, 464; 3 Har. (N. J.) 380; Adams on Equity, 31; 10 Ala. 269. But the mortgage itself was not binding on Mrs. Hazzard, because, 1st, the notary had no authority to take the acknowledgment; and, 2dly, the acknowledgment itself is

not sufficient.—16 Ala. R. 140; 1 Peters, 328; 12 *ib.* 345; 1 Har. & J. 291, 513; 2 Story's Equity, § 1391; 4 How. U. S. R. 226-8; 10 Serg. & R. 445.

WM. BOYLES, with whom was D. C. ANDERSON, *contra*:

1. The first objection raised to the validity of the proceedings in chancery, is, that the name of Mrs. Hazzard is not correctly stated in the original bill. It is a sufficient answer to this objection, that the mortgage, which is made an exhibit to that bill, shows her true name; and that the amended bill, with all the subsequent proceedings under it, states the correct name.

2. The second objection is, that the record does not show proof of publication as to the non-resident defendants. The answer is, that the sale of the mortgaged lands, the subject of this suit, was a judicial proceeding, made by a court having jurisdiction of the subject-matter and of the parties, and was therefore conclusive. The jurisdiction of the court over the parties is apparent on the face of the record. In the original bill, Hazzard and wife are stated to be non-residents, and an order of publication was made as to them; and in the order transferring the cause, as well as in the final decree, it is stated that the parties appeared by their solicitors. This shows the jurisdiction of the court over the parties, and that its power was brought into action; and whenever that is the case, the judgment of the court is conclusive.—10 How. 371; 2 *ib.* 319; 2 Peters, 167; 3 Wheat. 246, 340. The record also shows an appearance by the defendants' solicitor on several other occasions. The defendants are bound by these recitals.—6 Ala. 503; 9 *ib.* 272; 5 *ib.* 167; 8 *ib.* 467; 17 *ib.* 701; 22 *ib.* 131; 25 *ib.* 617; 3 Por. 267; 8 Shep. 38.

3. But, even if the decree of foreclosure be irregular and erroneous, it cannot be impeached in this collateral way. The defendants might have reversed the decree, on appeal; but the purchaser cannot be required to go beyond the order authorizing the sale. "Were the law otherwise, judicial sales would become traps and snares for honest men."—Cole v. Connolly, 16 Ala. 280. The purchaser at judicial sales is never responsible for the mistakes or irregularities of the court or its agents.—2 Peters, 169; 11 Serg. & R. 429. The

principle which gives sanctity to the proceedings of courts of competent jurisdiction, has always been deemed inviolable; being, in fact, rules of property, the source and foundation of titles, on which the repose of the country depends. The final decree and sale were made more than three years before the death of Mrs. Boykin, then Mrs. Hazzard; and the defendant's purchase was made with her knowledge and assent. The defendant's title, so far as these parties are concerned, is perfect.—10 Peters, 449, and cases there cited.

4. The filing of the bond, as required by the decree of the court, was a ministerial, not a judicial act; and it was not necessary that it should form part of the record, the presumption being that it was filed. Besides, the proof shows that Mrs. Hazzard was a resident of this State, and therefore no bond was necessary; and the statute has no application, where the parties appear.—5 Ala. 158; 9 *ib.* 180; 14 *ib.* 33.

5. The question as to the sufficiency of the acknowledgment, is covered by the decree of the court, directing the foreclosure of the mortgage. The parties appeared, and should have then litigated the question. Besides, the acknowledgment is a substantial compliance with the requisitions of the statute, and the act of 1831 (Clay's Digest, 154) authorized it to be taken by a notary-public.—19 Ala. 759; 2 *ib.* 203, 452, 482; 20 *ib.* 112; 12 How. 267. [See this point elaborated in petition for re-hearing.—Rep.]

RICE, J.—Prior to the 7th February, 1844, Sarah M. McGrew, being the owner of the land now in controversy, married Robert F. Hazzard, and had by him one child. During the coverture, and on the day aforesaid, they executed a mortgage of the land, to secure the payment of certain notes made by him. The certificate of a notary-public, dated the 22d February, 1844, and written under the mortgage, shows that the acknowledgment made by her before him, on a private examination apart from her husband, was, "that she signed, sealed, and delivered the above instrument of mortgage deed, on her own free will and accord, and without any force, persuasion, or threats from her said husband; and for the express purposes therein stated."

Upon these facts it is clear, that the interest of Robert F.

Hazzard in the land of his wife—to-wit, his interest as husband and tenant by the curtesy *initiate*—passed by the mortgage.—Barber v. Harris, 15 Wend. 615; 2 Bla. Com. 126-8.

The first question, of any difficulty, to be considered, is, whether the estate of his wife in the land did not pass by the mortgage.

By the law of this State, as it existed in 1844, a married woman under the age of twenty-one years was absolutely incapable of conveying lands, tenements, or hereditaments, lying and being in this State, or any right, interest, or estate therein; and a married woman over that age could not pass her estate in lands, tenements, or hereditaments, lying and being in this State, "without a previous acknowledgment made by her on a private examination, apart from her husband", before an officer authorized by law to take such acknowledgment, "that she signed, sealed and delivered the same, as her voluntary act and deed, freely, without *any fear*, threats, or compulsion of her husband, and a certificate thereof written on or under the said deed or conveyance, and signed by the officer before whom it was made."—Clay's Digest, 155, § 27.

Under this law, the mere execution by a married woman of a mortgage would not pass her estate in land. To give it any efficacy as a conveyance of her estate, it was essential not only that it should be executed by her, but that it should have been acknowledged and certified in the mode prescribed by the law, and that she should have been twenty-one years of age at the time of the execution and acknowledgment.

It does not appear that Mrs. Hazzard was twenty-one years of age when she executed and acknowledged the mortgage. But, even if that fact did appear, her acknowledgment on her private examination, as certified by the notary-public, is not, either in words or substance, the acknowledgment prescribed by law. It was essential that she should acknowledge, amongst other things, that she executed the mortgage "without *any fear*." She has not acknowledged this, nor any thing *in substance the same*. It will not do to say she has acknowledged something *like* it. Resemblance is not identity. Fear may exist on the part of the wife, "without any force, persuasion, or threats" from the husband. Her acknowledg-

ment, that she executed the deed on her own free will and accord, is not identical in substance with an acknowledgment that she executed it freely, without any fear of her husband. Fear may exist, and often does exist, in a degree so moderate as not to destroy the freedom of the will. Thus, "by faith, Noah, being warned of God of things not seen as yet, moved with fear, prepared an ark to the saving of his house."—Hebrews, ch. 11, verse 7. A deed, executed with very slight fear, by a person *sui juris*, could not, for that cause only, be set aside. Fear may exist to a degree which amounts to undue influence, or moral coercion. But it may exist in a much more moderate degree, and fall far short of undue influence, or moral coercion. It need not, and may not, be the predominant motive.—*Matthews v. Bliss*, 22 Pick. 48. If the words contained in the acknowledgment, by a married woman, of the execution of a deed purporting to convey her land, do not exclude, or negative, the idea that, at the time she executed the deed, any fear of her husband existed, the acknowledgment is insufficient, without regard to the degree of that fear. Her acknowledgment, that she executed it of her own free will and accord, does not negative the existence of fear in its mildest and most moderate degree.

We cannot dispense with any requirement of the law (*Bright v. Boyd*, 1 Story's Rep. 486; 1 Story's Eq. §§ 97, 177); and as the acknowledgment under consideration is not such as was prescribed, the mortgage did not pass the estate of Mrs. Hazzard in the land.—*Hollingsworth v. McDonald*, 2 Harris & Johns. 230; *Chanvin v. Wagner*, 18 Missouri R. 531; *Elliott v. Piersol*, 1 Peters, 338; *Gill v. Fauntleroy*, 8 B. Monroe, 178; *Jourdan v. Jourdan*, 9 Serg. & Rawle, 274; *Flanagan v. Young*, 2 Har. & McH. 38; *Martin v. Dwelly*, 6 Wend. 9; *Green v. Branton*, 1 Dev. Eq. Rep. 500; *Bright v. Boyd*, 1 Story's Rep. 487; 1 Story's Eq. Jur. §§ 96, 177; *Moreau v. Detchemendy*, 18 Missouri Rep. 522; *Warren v. Brown*, 25 Miss. R. 66.

But it is contended, that, although the mortgage is wholly ineffectual to pass her estate, yet she was divested of it by the proceedings under the bill to foreclose the mortgage; and this position is now to be examined.

That bill alleges that the mortgage was executed by her

husband and herself, but does not allege any fact which, even if true, did or could make it operative to pass her estate in the land. It does not allege that, at the time of its execution, she was twenty-one years of age, nor that it was acknowledged and certified in the manner made essential by our law to give it efficacy as a conveyance of her estate, nor that she had a separate estate in the land, or in any other property. It names her husband and her as defendants, but does not allege that either of them is a non-resident. It is clearly shown that, during her whole life, she was a resident. She was never made a defendant, by service of subpoena upon her husband, as required by our fourth rule of practice in chancery. As she was a resident, the publication made was void as to her, and did not make her a defendant. No plea, answer, or demurrer was filed by her husband and her, or by either of them. No order was applied for, or made, that she might answer or defend separately, or appear by solicitor, or in any other manner. Although there are in the minutes and final decree such recitals as the following, "The complainant and defendants appear by their solicitors, and consented in open court that the former connection of the chancellor with this cause as solicitor should interpose no obstacle to his decision of it",—yet there were several persons other than her and her husband, named in the bill as defendants, who had actually been made defendants by service of process, acceptance or waiver of service, or by publication. These other persons were persons *sui juris*, and capable of appearing by solicitor, and of waiving service of process and publication and any other provision of law made for their benefit and protection. During the whole time the suit for foreclosure was pending, she had no separate estate in the land, and was not in any respect a person *sui juris*. The decree in that suit directed the register to sell the land, but did not on its face determine *whose* interest, nor the *quantum* of interest which should be sold. The register sold the land, and reported the sale; and thereupon the court decreed, that the report be confirmed, "that the defendants' equity of redemption into and out of said premises be forever barred and foreclosed, and that the purchaser be let into possession thereof." Upon these facts we decide, that the estate

of Mrs. Hazzard in the land was not divested, and did not pass by the proceedings under the bill for foreclosure.—Shriver's Lessee v. Lynn, 2 How. (U. S.) Rep. 43; Hollingsworth v. Barbour, 4 Peters, 475; Lessee of Walden v. Craig, 14 Peters, 154; Webster v. Reid, 11 How. Rep. 437; Denning v. Corwin, 11 Wend. R. 647; 3 Phil. on Ev. (edition of 1839) 998, 1002; Hollinger v. Bank, 8 Ala. R. 605; Clay's Digest, 612, § 4; 1 Smith's Ch. Pr. 193, 253, 254; Elston v. Wood, 2 M. & K. 678; Hodgson v. Merest, 9 Price, 556; Hughes v. Evans, 1 S. & S. 188; Mole v. Smith, 1 J. & W. 665; Calvert on Parties, 265, 272; *Ex parte* Halsam, 2 Atk. 49; Clay's Digest, 354, § 58; Gee v. Cottle, 1 M. & C. 180; Dyett v. N. A. Coal Co., 20 Wend. 570; Ferguson v. Smith, 2 Johns. Ch. R. 139.

The proceeding for foreclosure was a proceeding not *in rem*, but *in personam*. It was essential to the validity of the decree therein rendered, as to Mrs. Hazzard, that the court should have had jurisdiction of her person, as well as of the subject-matter. She was a resident married woman, without any separate estate. The fourth rule of our practice in chancery prescribed the mode in which the court might acquire jurisdiction of her person. The court did not acquire such jurisdiction in that mode, and there is nothing in the record which shows that the court ever did acquire such jurisdiction. In the absence of any compliance with our fourth rule of practice in chancery, in the absence of any plea, answer or demurrer on the part of her or her husband, in the absence of any order applied for or made that she might appear by solicitor, or that she might answer or defend separately, *her appearance by solicitor*, whether that solicitor was appointed by her husband or herself, would not give the court jurisdiction over her person. We do not decide that, *after the jurisdiction of the court over the person of the wife has attached*, the husband cannot appoint a solicitor for himself and her. But we do decide that, *under the circumstances hereinabove stated*, the court could not acquire jurisdiction over her person, *merely from his* appointment of a solicitor, and the appearance of that solicitor for her. There is no law or rule in this State which enables *him*, by any such voluntary act, *to give the court jurisdiction over her person*, or to bind her by a

decree in a suit for foreclosure rendered without any notice to her, either actual or constructive, and without any opportunity to her to defend.—Hollingsworth v. Barbour, *supra*; 3 Phil. Ev. (edition of 1839), 865, and cases there cited from the Louisiana Reports; Lysterly v. Wheeler, 11 Iredell's Rep. 288; Sanford v. Granger, 12 Barb. Sup. Ct. Rep. 392.

We may concede, that where persons who are *sui juris* appear by solicitor, they give to the courts jurisdiction over their persons, by such appearance.—Catlin v. Gilder, 3 Ala. R. 536; Puckett v. Pope, 3 Ala. R. 552. But, in this respect, there is an essential difference between a person *sui juris* and a person who is not in any respect *sui juris*.

By the law, as it existed at the time Robert F. Hazzard married Sarah M. McGrew, he gained by the marriage a title to the rents and profits of her land, *during the coverture*. By the birth of issue, he became tenant by the curtesy *initiate*. But his right, as well as the right of those claiming under the mortgage executed by him, ceased and was defeated by the divorce *a vinculo* granted to her; and by that divorce, her right, which had been suspended during the coverture, was restored to her precisely as it would have been restored to her by his death.—Wheeler v. Hotchkiss, 10 Conn. Rep. 225; Barber v. Root, 10 Mass. Rep. 260; Renwick v. Renwick, 10 Paige, 420.

After this divorce, and in 1852, she married the appellant, and afterwards gave birth to a child. After this, and in 1853, and before this suit was commenced, she died, without having disposed of the land, leaving her husband, the appellant, living. If the common law had remained unchanged, he would, upon the facts above stated, have been "a complete tenant by the curtesy", and entitled as such to hold and use the land during his life.—2 Bla. Com. 126, 128; Preston on Estates, 516. But by the act of March 1, 1848, to secure to married women their separate estates, and the act of February 13, 1850, amending that act, the husband does not acquire any right to the property which his wife had upon his marriage or acquired afterwards, except as provided for in said acts. The right of the appellant asserted in the present case, is to be determined by the provisions of the last-mentioned act, which was of force at the time of his mar-

riage, or by the provisions of the Code, which went into effect on the 17th January, 1853.—Code, § 1990. We shall not now decide, whether the act of February 13, 1850, or the Code, must govern this case. The question was not decided in the court below. It may not be necessary to decide it; for, although appellant's wife died in 1853, it does not appear that she died after the Code went into effect. She may have died before the 17th January, 1853. And whether the Code, or the act of 1850, governs in deciding upon the right asserted in this suit by appellant, it is clear from what we have hereinabove decided, that the court below erred in its charge to the jury. For that error, its judgment is reversed, and the cause remanded.

NOTE BY REPORTER.—The foregoing opinion was delivered on the 15th January, and an application for a re-hearing was afterwards made by Messrs. D. C. ANDERSON, WM. BOYLES, and ROBT. H. SMITH, of counsel for the appellee, who submitted the following argument in support of their petition :

In the opinion of the court, recently delivered, it is decided that the defendant has no title to the premises sued for, 1st, because the certificate of Mrs. Hazzard's acknowledgment of the mortgage is not a sufficient compliance with the statute, and therefore did not divest her of title; 2dly, because it does not appear that Mrs. Hazzard, at the time of the conveyance, was twenty-one years of age; and, 3dly, because the decree in chancery, foreclosing the mortgage, and divesting the title of Mrs. Hazzard, is void as to her. The counsel for the appellee feel confident that, upon a re-examination of the points arising on the record, and of the authorities referred to by the court, as well as of other analogous cases, a different conclusion will be arrived at; and they therefore respectfully ask a re-hearing.

1. As to the effect of the certificate of acknowledgment [for which see the preceding statement of facts.] The statute under which this acknowledgment was taken, is in these words : "No estate of a *feme-covert* shall pass by her deed or conveyance, without a previous acknowledgment made by her, on a private examination apart from her husband, before one of the territorial judges", &c., "that she signed, sealed

and delivered the same, as her voluntary act and deed, freely, without any fear, threats, or compulsion of her husband, and a certificate thereof written on or under the said deed, and signed by the officer before whom it was made", &c. The objection made by the court to this certificate is, that the word *fear* is omitted from it. We respectfully submit that, under our statute, the word *fear* is not essential to constitute a good certificate, that any other words of equivalent import are sufficient, and that this certificate is a substantial compliance with the law. While it is conceded; that (in the language of the court) "*fear may exist* on the part of the wife, without any force, persuasion, or threats from her husband"; yet it is difficult to conceive how the mind may act *freely, of its own will and accord*, and yet be governed in that act by *fear*. To act *freely, on one's own accord*, and yet to act in the same thing under the effect of *fear*, is a plain solecism, and a moral contradiction. Freedom of the will necessarily implies independent volition, or the absence of all external controlling agency. If *fear* enter into the mind, and be in any degree the cause of its decision, the will is not *free*—there is no self-will in the result. The object of this statute, and indeed of all the American legislation on this subject, was, while getting clear of the cumbrous system of fine and recovery, to provide at the same time a convenient mode of conveying the wife's real estate, and protecting her interests from the supposed influence of her husband. The statute points out a mode for ascertaining whether the wife had freely executed the deed, and requires the evidence of that fact to appear in the certificate of the officer before whom the acknowledgment is made; but no special form of words is provided for that purpose. Neither our law, nor that of any other State in the Union, has prescribed a form which is made indispensable. The wife's *voluntary consent* to the conveyance is the main object required by the law; and her declaration to that effect, before the proper officer, and in the absence of her husband, is the proof of such consent. The accumulation of phrases, of equivalent or similar import, would add nothing to the real object of the law. If she executes the deed *of her own free will and accord*, and under neither the persuasion nor coercion of her husband, how is the proof of voluntariness ad-

vanced by the negative addition that it was not under the influence of fear? The declaration that she acts "*on her own free will and accord*", excludes the idea of fear as a motive of action.

This very point has received an illustration by the supreme court of Ohio, in the case of *Brown v. Farran*, 3 Ohio, 153, to which the court is referred. They say:—"The third objection is, that it does not appear from the certificate that the wife acted without fear or coercion of her husband. It is true that those words are not contained in the certificate; but the justice certifies that she acknowledged the deed to be her voluntary act; and if voluntary, it could not have been done under the influence of fear or coercion. The term 'voluntary' is defined to be, 'acting without compulsion', 'acting by choice', 'willing', 'of one's own accord.' The declaration of the wife, then, on her separate examination, excludes the idea of fear or force. If she executed the instrument willingly, of choice, and of her own accord, as her admission before the justice imports, she could not have been under the influence of fear, much less of coercion. An action, done in consequence of fear, cannot be done willingly and of choice. The one unavoidably excludes the other. So that the magistrate, although he has not used all the words given in the statute, has taken one which includes the substance of all the rest. It will not be seriously contended that the magistrate is bound to use the same language that he finds in the statute. The legislature has not undertaken to prescribe a form of acknowledgment that is to be literally pursued. If the certificate contains the substance of the law, though in the language of the officer, it is sufficient. On any other principle, it is a matter of doubt whether the records of the State contain a solitary deed with a valid acknowledgment. It is, however, safe and prudent, to adopt the language of the act, with but little (if any) variation; and yet it would be attended with destructive consequences to consider such an adherence as essential to the validity of an acknowledgment. If she understood what she was doing, and, in the absence of her husband, admitted that she had done it, and that she did it voluntarily, which implies the absence of fear or coercion, her rights have had all the protection which the law intended

to afford, and she cannot be permitted to revoke her deed for any defect of form."

In the cases of *Chesnut v. Shane's Lessee*, 16 Ohio, 599, and *Ruffner v. McLenan*, *ib.* 639, the subject of the acknowledgment of deeds by *femes covert* was very fully and ably considered; and in the latter, the case of *Brown v. Farran* was reviewed and approved. Indeed, the latter case, in sustaining the validity of such acknowledgments, goes greatly beyond the ground taken in *Brown v. Farran*. In allusion to the decision in *Brown v. Farran*, the following just and strong language, which has peculiar pertinence to this case, was there used:—"Any other decision would have shaken the title to many millions of property, which had been acquired by the then present holders by fair and *bona fide* purchase. A contrary decision, it is true, might have enabled many widows to reclaim property, which had been, by their consent, sold and conveyed, for an ample consideration; or it might have enabled them to enforce claims for dower, to premises for the conveyance of which they had joined with their husbands, and done all that on their part could be done to make such conveyance effective. And if such conveyances are not held to be effective, it is for the sole reason that an officer, whose duty it was to take an acknowledgment of the conveyance, has omitted some technical formality in reducing the certificate of acknowledgment to writing. Another reason why I assented to the principle of this decision, and why I am still willing to adhere to those principles, is, that I am unwilling to adopt any rule of construction of a statute, or to recognize any principle of law, which will encourage any portion of the community, whether male or female, in fraud or dishonesty."

The same point came up before the supreme court of New Jersey, in *Den v. Geiger*, 4 Halsted, 225, where it was determined, upon a very full examination and review of the authorities, that a certificate of acknowledgment, which omits to state that the grantors executed the deed *voluntarily*, and that the acknowledgment of the wife was on a private examination, and without any *fear*, may be good, if it contain words equivalent to those omitted. The words of the New Jersey act, quoted on page 228, are precisely the same with

our act now under consideration. After speaking of the proper mode of construing the act, and that a substantial compliance was sufficient, it is there said,—“This objection [as to the legislature using more words than were necessary] finds its answer in the same section; for, if the *feme covert* executed the deed freely, she must have done it voluntarily, and without fear, threats, or compulsion. Hence it appears they were very properly not sparing of words, when these might tend more fully or clearly to express their meaning. The censure cast on this acknowledgment, for the want of the word *fear*, is *entirely too severe a criticism*, if a substantial compliance satisfies the act. It is very possible, as remarked by counsel in the argument, that fear may exist without threats; but it is not very easy to suppose there can be fear, if there be no compulsion; and if the wife executed the deed ‘freely and voluntarily’, she must necessarily have been without fear. These expressions negative, in the most unequivocal and exclusive manner, the presence of fear.” In this same opinion it is said, that the question raised was one of incalculable importance; that it interested, in a greater or less degree, almost every freeholder in the State; and that, if a judge may ever look to consequences, he should do so here, where he may reflect on the wide-spread havoc and desolating ruin which must result from requiring, for the first time, a literal compliance with the statute.

The very statute now under consideration has been passed on by the supreme court of the United States, in the case of Dundas v. Hitchcock, 12 Howard, 269, where it is said,—“It is objected, also, that this acknowledgment is not in the very words of the statute. In place of the words, ‘as her voluntary act and deed, freely’, it substitutes the words, ‘freely, and of her own accord.’ That the words of the acknowledgment have the same meaning, and are in substance the same with those used in the statute, it needs no argument to demonstrate; and that such an acknowledgment is a sufficient compliance with the statute to give validity to the deed of the wife, is not only consonant with reason, but, as the cases cited by the counsel show, supported by very numerous authorities. The act requires a private examination of the wife, to ascertain that she acts freely, and not by compulsion

of her husband; but it prescribes no precise form of words to be used in the certificate, nor requires that it should contain all the synonyms used in the statute to express the meaning of the legislature. In other acts of the same legislature, where a precise form of acknowledgment of certain deeds is prescribed, it is provided 'that any certificate of probate or acknowledgment of any such deed shall be good and effectual, if it contain the substance, whether it be in form or not, of that set forth in the first section of this act.'—Clay's Digest, 153. The legislature have thus shown a laudable anxiety to hinder a construction of their statutes, which would require a stringent adherence to a mere form of words, without regard to their meaning or substance, and make the validity of titles to depend on the verbal accuracy of careless scribes."

In *Owen v. Norris*, 5 Blackf. 481, the court held the certificate valid, although it did not agree in form with the words of the statute, but contained the substance or meaning of it.

In *Gregory's Heirs v. Ford*, 5 B. Mon. 481, the certificate did not state that the deed had been "shown and explained" to Mrs. Gregory on her privy examination, "which (the court say) in strict propriety should have been done"; yet the certificate was held sufficient, because the fact of privy examination, and her declaration that she freely and voluntarily sealed and delivered, &c., raises the implication that the deed was shown and explained to her, because the clerk was presumed to have done his duty in making the examination, and because it was not to be presumed that he would so certify without ascertaining that she understood what she was doing. They further say, "We know of no case in which the deed of a *feme covert*, certified as this is, has been rejected. We are disposed to construe the statute and certificates liberally, with a view of maintaining, rather than destroying, titles derived from *femes covert*"; and, in there sustaining the certificate, the court went much further than is required in this case.

In the case of *Nantz v. Bailey*, 3 Dana, 112, the whole subject is very fully considered. In that case, it did not fully appear on the face of the certificate that Mrs. Nantz acknowledged the deed apart from her husband, or that she signed

and sealed it, or that the deed was, on privy examination, shown and explained to her,—and these were all required by the law of Kentucky; yet the certificate was sustained, because, upon a reasonable construction of the language employed, these facts appeared to have taken place; and a literal compliance with the statute was held unnecessary.

The case of *Shaller v. Brand*, 6 Binney, 435, meets every objection urged against this certificate; for the acknowledgment was not so certain or particular as this. It is there said by Tilghman, C. J., that “it cannot be doubted that a woman’s voluntary consent excludes all idea of coercion or compulsion.”

To the same effect are the following cases: *Robin’s Lessee v. Bush*, 1 H. & McH. 50; *Webster’s Lessee v. Hall*, 2 *ib.* 19; *Hoddy’s Lessee v. Harryman*, 3 *ib.* 581; *McIntire’s Lessee v. Ward*, 5 Binney, 296; 1 Peters’ C. C. R. 188; *Jackson v. Gilchrist*, 15 Johns. 89; *Troup v. Haight*, 1 Hopk. Ch. 267; *Raverty and Wife v. Fridge*, 3 McLean, 245; *Vance v. Schuyler*, 1 Gilman, 160; *Kottman and Wife v. Ayer*, 1 Strob. Law R. 571; *Etheridge v. Ferebee*, 9 Ired. Law R. 312; 1 *ib.* 113; 8 B. Mon. 177; 15 Ohio, 423; 10 *ib.* 599, 639, 799.

We propose now to show, very briefly, that the authorities cited by the court do not sustain its opinion; and this will appear on a slight examination of them. The references to 1 Story’s Equity, 597, 177; 1 Story’s R. 486; 1 Peters, 338; 6 Wend. 9; 1 Dev. Eq. 487; and 18 Mo. 522, only show that equity will not aid a defective execution of powers by *femes covert*, or supply a circumstance for the want of which the legislature has declared the instrument void; and that the privy examination and acknowledgment of a deed by a *feme covert* cannot be proved by parol. These points are not raised in our case, nor are they at all disputed by us. In the case of *Jourdan v. Jourdan*, 9 S. & R. 173, as in *Elliott v. Piersol*, 1 Peters, 338, the main point was, that the defective certificate could not be helped by proving that the facts, as they actually occurred, were different from the statement of them contained in the certificate,—the clerk having omitted to state, that the wife, when examined apart from her husband, voluntarily consented; and this we certainly do not dis-

pute. In *Chauvin v. Wagner*, 18 Mo. 531, it was said by Gamble, J., that under his construction of the act of 1825, the want of the words "and does not wish to retract", in the certificate of a deed conveying the wife's real estate, was fatal. Although this point does not occur in our case, it may be observed that the other two judges did not concur in this opinion; and the contrary has been decided, on precisely the same statute, in the case of *Hughes v. Lane*, 41 Illinois R. 123. But the tenor of Judge Gamble's opinion, and the dissenting opinion of Judge Scott, strongly support the validity of this certificate. In the case of *Gill & Simpson v. Fauntleroy's Heirs*, 8 B. Monroe, several certificates were examined by the court; in one of which it was determined, that the fact of privy examination and voluntary consent must appear on the face of the certificate,—a doctrine not controverted by us; and in another it was held, that a declaration by the wife, "that she did not wish to retract", was tantamount to the statutory declaration, "that she freely acknowledged the deed." This is a much stronger case than the present; and the reasoning of the court, alone, is sufficient to sustain this certificate.

These are all the authorities referred to by the learned judge who delivered the opinion of the court, in support of the position that the absence of the word *fear* is fatal to the notary's certificate. We feel confident, that the authorities referred to by us were not brought to the knowledge of the court when this cause was argued, and that this point was not examined at any length, nor its importance very seriously noted, by either the counsel or the court. We beg your Honors, therefore, to consider that the construction of this statute for which we contend was adopted, in the most express and authoritative manner, by the supreme court of the United States, by Justices Washington, McLean and others on their circuits, by the courts of New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Kentucky, Ohio, and Missouri; and that the most eminent judges, in delivering their judgments on it, have used the strongest language, and with remarkable unanimity. We beg your Honors to consider, also, that it is not here pretended that Mrs. Hazzard, in the execution of this deed,

was imposed on or deceived; that the defendant, before he would purchase the premises, ten years after the deed in question was executed, obtained her consent to the purchase; that he is a purchaser under a judicial sale, and thus entitled to the most favorable consideration of the courts; and that the only objection to the certificate is the omission of a word, which the most respectable courts have pronounced unnecessary. If, under such circumstances, the defendant's title is still held invalid, he cannot but feel that his is an exceptional case, and one of extreme hardship; and that his interests are sacrificed to what one of the judges calls "a severe criticism on language"; and to the ingenuities of refined reasoning.

2. As to the next objection, it is enough to say that, on a fair reading of the statute, it cannot be made to appear that it forms any part of the officer's duty, before whom a married woman appears, to make any inquiry or examination as to her age. This construction has never been adopted in this State, either by the courts, the bar, or the officers by whom such certificates are taken.

Per Curiam (March 10).—This application for a re-hearing has been very fully considered, and is overruled.

HENDERSON vs. SEGARS ET AL.

[BILL IN EQUITY BY CESTUIS QUE TRUST AGAINST TRUSTEE TO SET ASIDE SETTLEMENT AND COMPEL ACCOUNT OF TRUST.]

1. *Estoppel against trustee by acceptance of trust.*—A trustee for a married woman and her children, under appointment from the chancery court, knowing at the time of his acceptance that the deed creating the trust was fraudulent as to creditors, assumes all the duties, liabilities and disabilities which attach to ordinary trustees, and is estopped from setting up against the beneficiaries the claims of creditors, or his own claims as surety of the debtor.
2. *Settlement of trustee set aside on objection by beneficiaries.*—If such trustee sells the trust property under a power of attorney from the wife, applies the proceeds

of sale, with her consent, to the payment of the debts on which he was bound as surety, obtains her receipt showing that the proceeds had been applied for her support, and uses it as a voucher on the settlement of his trusteeship,—equity will not recognize such an execution of the trust, but will set aside the settlement on the application of the beneficiaries; and the trustee will be held estopped from insisting that the proceeds were applied as the court, on a proper application, would have directed.

3. *Construction of trust deed.*—A deed conveyed certain slaves to a trustee “for the support and maintenance” of a married woman “and her children during her life, and at her death to become the absolute property of her children”, with power to the trustee, if he at any time should deem it necessary, to sell any portion of the property, and to apply the proceeds to the support and maintenance of the beneficiaries. On bill filed by the beneficiaries against the trustee, the record did not show that the husband had ever claimed his wife’s interest in the property; and the court cited *Hill and Wife v. McRae*, 27 Ala. 175, as indicating their views with respect to the wife’s interest.

APPEAL from the Chancery Court of Pike.

Heard before the Hon. WADE KEYES.

The material facts of this case, as disclosed by the pleadings and proof, may be thus stated: On the 8th September, 1843, one William B. Darby executed a deed to his brother, Jeremiah Darby, by which, in consideration of natural love and affection for his niece, Sarah Eliza Hanchey, he conveyed a negro woman and her children to said Jeremiah, in trust for the support and maintenance of the said Sarah and her children; and the deed contained the following provisions: “Said property is to be held by the said Jeremiah Darby in trust for the maintenance and support of the said Sarah, during her natural life, and the heirs of her body, should any be begotten; and, at the death of the said Sarah, the same is to be divided equally and proportionally between her children, should she have any. To have and to hold the aforesaid property, to him, the said Jeremiah Darby, and his heirs, in trust, however, for the use and maintenance hereinbefore named. And it is hereby understood by these presents, and expressly declared, that the aforesaid property is to be held by the said Jeremiah Darby in trust for the use of the said Sarah and her children, should there be any, during the life of the said Sarah; and at her death, the same is to vest absolutely, and become the absolute property of the children of the said Sarah, which she may hereafter have by the said

John Hanchey, and the legal heirs of such as may be deceased, to be by them held and enjoyed forever. And it is further understood, that if, during the life of the said Sarah, it should become necessary, in the view of the said Jeremiah Darby, to sell off a part, or the whole of said property, for the benefit and maintenance hereinbefore named, then, and in that case, it shall be lawful for the said Jeremiah Darby to dispose of a part or all of said property, at public or private sale, and apply the proceeds arising from such sale to the use hereinbefore named; and should the said Jeremiah Darby deem it necessary, during the life of the said Sarah, to dispose of said property, or a part thereof, it shall be lawful for him to execute titles to the purchaser in his own name, thereby barring the interest of the said Sarah and her children in said property, which they may have either in law or equity. In witness whereof, &c.

At the time this deed was executed, William B. Darby, the grantor, had no title to the slaves conveyed, nor did he have possession of them; but the slaves belonged to Wiley White, who was the father of the said Sarah, and who made a fraudulent sale of them to the said Darby, in order that the latter might convey them by deed to said Sarah,—the whole transaction being a scheme to defraud said White's creditors, and this fact being known to the said Sarah at the time. The trustee named in the deed, after his acceptance of the trust, became insane, and was removed by the chancery court; and on the 21st October, 1845, said court, on the application of Mrs. Hanchey, appointed Eli Henderson as trustee, in his stead, who thereupon accepted the trust, and entered into bond. At the time said Henderson accepted the trust, he was privy to the fraud attending the transaction, and the negroes had been privately removed to Arkansas, with his knowledge, to avoid the debts of said Wiley White.

On the 8th November, 1845, Mrs. Hanchey, whose husband had previously died, executed to Henderson a power of attorney, authorizing him to go to Arkansas and sell the negroes, and to apply the proceeds to the payment of White's liabilities on his official bond as sheriff, on which Henderson was bound as surety. Henderson accordingly went to Arkansas, took possession of the negroes under the power of

attorney, carried them to Mississippi, and there sold them for \$700, which was about the average market price of slaves. With this money he returned to Alabama, and Mrs. Hanchey then gave him a receipt for the amount, acknowledging that it had been applied according to the provisions of the deed of trust; but, at the time this receipt was given, Mrs. Hanchey knew that the money was to be applied to the payment of White's liabilities as sheriff, and consented thereto, and Henderson accordingly so applied it.

In December, 1846, Henderson applied to the court for a final settlement of his trusteeship, and a final settlement was made in November, 1847. On this settlement, Henderson charged himself with the \$700 realized from the sale of the negroes, and obtained credit for the amount specified in Mrs. Hanchey's receipt, and then resigned his trust; but there was no order discharging him by the court.

In June, 1851, Mrs. Hanchey, having intermarried with Hugh R. Segars, filed her bill in chancery, by her said husband as next friend, against said Henderson, praying that said final settlement and receipt might be set aside and held for naught, that an account might be taken of the trust property which had come to the hands of Henderson as trustee, that he might be removed from the trusteeship, and her husband appointed in his stead; and the prayer for other and further relief was added. The bill alleged the execution of the deed of trust, the removal of the first trustee, the appointment of Henderson, and his acceptance of the trust; that complainant consented to his sale of the negroes, on his representations that it was necessary for her support; that he applied the proceeds of sale to the payment of liabilities against himself and others, and afterwards, by repeated importunities, and by taking advantage of his confidential relation, obtained from complainant the receipt which he used as a voucher on the settlement of his trusteeship, and thereby obtained credit to the amount therein specified.

An amended bill was afterwards filed, bringing in as parties complainant Hugh R. Segars, in right of his said wife, Mary A. Segars, an infant daughter of said Hugh R. and Sarah E. Segars, and John W. Hanchey, a minor son of said Sarah and her first husband.

The defendant answered the bill; admitting his acceptance of the trust, and all the other material facts alleged; setting up the final settlement and receipt, and the original fraud in the execution of the deed, in bar of the relief sought by the bill; and demurring for want of equity.

The chancellor rendered a decree in favor of the complainants, which is now assigned for error.

NAT. HARRIS, for the appellant:

1. If all the complainants are not entitled to relief, the bill must be dismissed.—*Moore v. Moore*, 17 Ala. 631; *Wilkins v. Judge*, 14 *ib.* 137.

2. Under the terms of the deed, Mrs. Segars did not take a separate estate in the slaves, but her husband (Hanchey) took an estate in them during her life; and Mrs. Segars, therefore, was not entitled to any decree against the appellant.—*Lamb v. Wragg & Stewart*, 8 Porter, 73; *Cook v. Kennerly & Smith*, 12 Ala. 42; *Pollard v. Merrill & Eximer*, 15 *ib.* 169; *Strong v. Gregory*, 19 *ib.* 146; *Bender v. Reynolds*, 12 *ib.* 446; *Gayle v. Br. Bk. at Mobile*, 21 *ib.* 414.

3. But, if Mrs. Segars took a separate estate in the slaves, then, after the death of her first husband, she had the undoubted right to dispose of her separate estate in any manner she thought proper, and a court of equity would have compelled the trustee to hold her interest for the use of her alienee.—*Greenleaf's Cruise*, m. p. 448. Even if she had been a *feme covert* at the time she authorized the appellant to dispose of the property, she would have had the right to make such a disposition of her interest in it, if she chose.—*Hooper v. Smith*, 23 Ala. 639; *Bradford and Wife v. Greenway, Henry & Smith*, 17 *ib.* 800.

4. The evidence shows that the negroes conveyed by the deed were liable for the debts of White, that the proceeds of their sale were applied to the payment of his debts, and that Mrs. Segars, with a full knowledge of the application of the money, and after she had consulted counsel, signed the receipt set up by the appellant. The proceeds of sale were thus applied as the law, upon a proper proceeding being had for the purpose, would have decreed their application; and the trustee was authorized to make such an application, since the law

would have compelled him to make it.—Elliott v. Horn, 10 Ala. 348. Mrs. Segars cannot now object to the application.

JAMES E. BELSER and JAMES L. PUGH, *contra*:

1. The deed executed by Darby created a separate estate in Mrs. Segars, so far as her husband was concerned.—Hill and Wife v. McRae, 27 Ala. 175; Rugely v. Robinson, 10 *ib.* 703; 2 Beavan, 63; 3 *ib.* 20; 3 Hare, 185; 1 Leigh, 443.

2. The estate of the wife was inalienable. The only right she had was to a support out of the property during her life, the *corpus* of the property being given to her children after her death. This right to a support was not capable of being identified and separated from that of the other *cestuis que trust*. How could a creditor or purchaser reach it, or ascertain and set apart the extent and amount of it? A conveyance of such an interest must be inoperative, since the subject-matter is so locked up and hedged in as to be incapable of separation without prejudice to the rights of others.—Spear v. Walkley, 10 Ala. 328; 12 *ib.* 652; Andrews v. Hobson, 23 *ib.* 219; Hill and Wife v. McRae, 27 *ib.* 175.

3. If Hanchey ever had any interest in the negroes, under the deed, that interest was merged by his death.—4 Leigh, 550; 11 Humph. 425; 2 Swan, 460.

4. The trustee, by accepting the trust, incurred all the responsibilities which attach to the relation of trustee and *cestui que trust*, and is held to the validity of the deed as a *bona fide* conveyance.—Godwin v. Yonge, 22 Ala. 553; Andrews v. Hobson, 23 *ib.* 219; 7 *ib.* 652; Roden v. Murphy, 10 *ib.* 804; Marler v. Marler, 6 *ib.* 367; 1 Vesey, sr., 522.

5. The receipt is open to explanation, and does not estop the complainant.—Johnson v. Johnson, 5 Ala. 95; Saunders v. Hendrix, 5 *ib.* 225; McCravey v. Remson, 19 *ib.* 430; Ware v. Cowles, 24 *ib.* 449; 9 B. & C. 577; 6 Pick. 445.

CHILTON, C. J.—There can be no doubt of the fact, so clearly shown by the proof, that the arrangement by which the slaves mentioned in the bill were conveyed in trust to Jeremiah Darby, for the support and maintenance of Mrs. Segars and her children, was intended to defraud the credi-

tors of Wiley White. It seems to have been a sort of family arrangement to screen the property from liability to White's debts, and with which the parties concerned were well enough satisfied until these debts were pressed as against them, when the idea of an honest application of the proceeds of the slaves occurs for the first time.

The law wisely ordains that a man shall not take advantage of his own wrong, and, as a check upon frauds of this kind, it allows the defrauded creditors to pursue the property in the hands of the fraudulent vendee, and as to them regards the fraudulent transfer or arrangement, by which it is attempted to divest the title of the debtor, as though it had never been made; but as to the parties to the fraud, they are bound by it.

In the case before us, the appellant voluntarily made himself a party to this deed, by accepting the title as trustee, and entering into bond and security for the faithful execution thereof. He was apprised of the condition of the property,—knew that it was in Arkansas, whither it had been run in furtherance of the fraudulent scheme; and having thus made himself a party, and pending the obligation which he had assumed as the executive agent of the court of chancery to carry out the trust, it was not competent for him to set up the claims of creditors, or any claim of his own as a creditor or surety for White, as antagonistic to the trust. He was effectually estopped by reason of the relation he voluntarily assumed.

The deed being valid as to him, all the duties, liabilities, and disabilities which attach to ordinary trustees, at once were devolved on him.

But it seems, liabilities as surety upon White's bond as sheriff were fixed by judgments upon him, and he becomes interested in making this property available in their payment. To this end, he obtained a power of attorney from complainant to sell the slaves,—sold them, four in number, for seven hundred dollars, and applied the proceeds towards the payment of the debts for which he was bound, and obtained from the complainant a receipt, showing that the proceeds had all been applied to her support. This receipt he filed as a voucher in the chancery court, which appointed him

trustee. A settlement was thereupon predicated, and he resigned his trust.

We cannot, for a moment, recognize *such* an execution of a trust. The trustee merely uses it as a guise to serve his own selfish purpose. So far from executing the trust, as his vouchers assert, his sole effort has been effectually to defeat it. The position, that the proceeds have gone where a court of chancery would have placed them, is fully met by the fact, that the appellant is estopped from saying this; for he cannot set up a claim in opposition to the trust. He has said, that the trust was *bona fide* and honest, by accepting it, and he shall not now avail himself of the relation of trustee, and the influence and opportunities it affords, to defeat the trust upon the ground that it was dishonest and fraudulent.—Godwin v. McGehee, 22 Ala. Rep. 553.

But, it is said, the complainant not only consented to the sale, but, with a full knowledge of all the facts, authorized the proceeds to be thus appropriated. To this we say, the deed requires the *corpus* to be retained by the trustee for the support and maintenance of Mrs. Segars and her children, and for this purpose only. She then had a child born, who was one of the beneficiaries under the deed, as the trust opens and lets in the after-born children of Mrs. S. The profits of the entire *corpus* may be needed for the support of the children, even if none of it was required by their mother for her support. The sale was therefore a conversion; and since, under the circumstances, the purchaser acquired a good title, as against these parties, if he purchased *bona fide*, the proceeds must stand as the *corpus*, and be held in trust for the purposes expressed in the deed. Aside, however, from this consideration, we should not hesitate to hold, that the transaction between the trustee and the beneficiary, the effect of which is a gift of the entire subject-matter of the trust to the trustee, in the procurement of false vouchers, evincing a strict conformity to the requirements of the trust, but, in truth, designed to defeat it, could not be supported against the objection of the *cestui que trust*. The condition of the parties, the relation of trustee and *cestui que trust*, and the profit to the trustee without any corresponding benefit to the beneficiary, all forbid that we should sustain the transaction.

Shorter, adm'r, &c., v. Urquhart, adm'r, &c.

Aside from positive fraud, public policy forbids such dealing. 1 Story's Eq. Jurisp. § 321, and notes.

As to the position, that this property vested in Hanchey, the first husband of Mrs. Segars, it is enough to say, that the record no where shows that he ever held it as such. The most he could have claimed was the share of the profits to which his wife was entitled; and without now deciding that he acquired an interest even to that extent, it is enough that no question as to such profits is raised by the record. What we said in *Hill and Wife v. McRae*, at the last term, 27 Ala. 175, is sufficient to indicate our views with respect to the nature of Mrs. Segars' interest.

The decree of the chancellor conforms to our view of the law. Let it be affirmed, with costs.

SHORTER, ADM'R, &C., vs. URQUHART, ADM'R, &C.

[TROVER FOR CONVERSION OF SLAVE.]

1. *Waiver of irregularities by failing to object—Clerical misprision.*—If a writ be sued out against two administrators, and the suit discontinued in the declaration as to one, on whom process was not served, on the ground of non-residence, the other defendant, if he appear and defend without objection, cannot avail himself of the irregularity (if any) on error; and the naming of the non-resident administrator, as a defendant, in the margin of the minute entries, is a mere clerical mistake.
2. *Secondary evidence of records.*—In the absence of all evidence showing the jurisdiction of the court of ordinary in Georgia, a transcript from its records, recognizing a person as administrator, is not admissible to show a previous grant of letters to him, although the records of the court are proved to have been destroyed by fire; nor can the grant of administration, which is a judicial fact, be proved by a party's admissions on oath in another case.
3. *Conversion by administrator no cause of action against estate.*—When an administrator is sued in his representative character, for an alleged conversion of a slave by his intestate, proof of his possession and employment of the slave at the commencement of the suit does not authorize a recovery against him, since the estate is not responsible for his acts.

APPEAL from the Circuit Court of Russell.

Tried before the Hon. NAT. COOK.

This action was brought by John A. Urquhart, as administrator of Eli S. Shorter, deceased, against Elizabeth Shorter and George Hargraves, as administratrix and administrator of James H. Shorter, deceased, to recover damages for the conversion of a slave by the defendants' intestate in his lifetime; and was commenced in March, 1849. The writ was returned executed on Elizabeth Shorter, and not found as to Hargraves; and the suit was discontinued as to the latter, in the declaration, on the ground that he resided beyond the limits of the State; but his name was still mentioned, as a defendant, in the margin of all the subsequent minute entries. The only plea was the general issue, with leave to give in evidence any special matter of defence; and a trial was had at the September term, 1853.

On the trial, as the bill of exceptions states, the plaintiff proved that his intestate was a resident citizen of the county of Muscogee, in the State of Georgia, at the time of his death, which was in 1836; that he died possessed of a large amount of property, both real and personal, most of which (including the negro now in controversy) was in Georgia, though some of the lands lay in Barbour and Russell counties, Alabama; that James H. Shorter, the defendants' intestate, resided in Columbus, Georgia, at the time of his death, which took place in 1847, and had a plantation in Russell county, Alabama; that said James, in 1845, told his overseer that 'he had a negro, belonging to his uncle Eli (meaning said Eli S. Shorter), whom he would send over', and then sent over to him the slave sued for; that the slave worked on the plantation of said James in 1845, was seen with his other negroes in Russell county after his death, and was in the possession of the defendant at the commencement of the action. He also proved his own appointment as administrator of his intestate, by the orphans' court of Russell county, in January, 1839, "which was the first grant of administration in that county", the value of the slave, &c., and then rested his case.

"For the purpose of showing that the orphans' court of Russell had no jurisdiction to appoint an administrator of

Shorter, adm'r, &c., v. Urquhart, adm'r, &c.

the estate of said Eli S. Shorter, in January, 1839, and that the plaintiff had no right to institute this action, the defendant offered to introduce a transcript, duly authenticated, from the records of the orphans' court of Barbour county, showing that said court, in February, 1838, appointed one Reuben C. Shorter administrator of said Eli; which transcript also showed the revocation by said court, in October, 1838, of its said grant of administration."

"The defendant then offered evidence to the court, showing that the court-house of Muscogee county, Georgia, was destroyed by fire in 1839; that the fire consumed nearly all the records, books, and papers of the different courts of the county, and the whole of those belonging to the court of ordinary; and that said James H. Shorter acted as one of the administrators of said Eli S. Shorter, in Georgia, about the years 1840 and 1841, and up to the time of his death. Upon this state of facts, the defendant's counsel offered to introduce a transcript, duly authenticated, from the records of said court of ordinary; to the introduction of which the plaintiff objected."

In this transcript, the clerk certifies that, having inspected the records of his office touching the administration of the estate of said Eli Shorter, he finds the proceedings which he then copies at length, and which are as follows: 1st, certain proceedings had on the petition of Thomas Preston in January, 1839, to obtain title to a tract of land sold to him by said Eli in his lifetime, in which it is recited that James H. Shorter and Sophia H. Shorter are the administrator and administratrix of said Eli; and, 2dly, an order, made at the January term, 1840, in these words: "Copy of return number one, the original having been destroyed by fire, for the year 1837, and return number two, for the year 1838, made by James H. Shorter, administrator of Eli S. Shorter's estate, having been examined, with all the vouchers, and found correct; it is ordered that the same be received, passed, and admitted to record."

"The defendant then offered in evidence, in connection with the foregoing facts, an affidavit made by the plaintiff in a certain chancery suit instituted by him against the defendant and others, and appended to the bill of complaint therein,

stating the fact to be true that said James H. Shorter had been appointed administrator of said Eli, previous to 1839, by said court of ordinary of Muscogee county; and offered to read the same, so far only as the affidavit and bill showed these facts. The opposite counsel objected to the introduction thereof, and the court sustained the objection, and ruled the said testimony inadmissible; to which ruling the defendant excepted."

"The defendant then offered in evidence an affidavit, sworn to by the same plaintiff, and stating the same fact; but the court sustained an objection to it, and ruled it out, and the defendant excepted."

"This was all the evidence on either side. Thereupon the plaintiff moved the court to exclude from the jury the said transcript from the records of the court of ordinary of Muscogee county, Georgia, on the ground that no sufficient predicate had been laid for admitting secondary evidence, or any evidence, of the fact that James H. Shorter was administrator of said Eli in Georgia. The court sustained the objection, and excluded the transcript; and the defendant excepted."

"The court then charged the jury, that the record of the appointment of an administrator on the estate of Eli S. Shorter in Barbour county, as shown in evidence, was no defence to this action; and that if they believed from the evidence that the slave sued for was the property of said Eli Shorter at the time of his death, and that plaintiff had been appointed administrator of his estate in Alabama before the commencement of this suit, and that the defendant, at the commencement of the suit, had the slave in her possession, and at work on her plantation, their verdict should be for the value of the slave."

The defendant excepted to this charge, and requested several others, which it is unnecessary to notice.

The errors assigned are, the rulings of the court on the evidence, the charge given, and the refusal to give the charges asked.

GEO. D. HOOPER, with whom was JAMES E. BELSER, for the appellant, made these points:

1. The cause was discontinued by the omission of the co-

administrator from the declaration; and, if not discontinued, it was erroneous to render judgment, under the issues joined, without any proof of the non-residence of the party as to whom the suit was discontinued.

2. When record evidence of the grant of letters of administration is destroyed, a grant ought to be presumed, upon proof from the records of various courts of the recognition of the administrator, and of his acts in that capacity.—*Battles v. Holley*, 6 Greenl. 145.

3. The affidavit of the opposite party, in a cause between the same parties, should have been received as secondary evidence. There are no degrees in secondary evidence.—1 Greenl. Ev. p. 160.

4. The general property in the negro was in the Georgia administrator, if any. There were assets of great value in Georgia, of which the slave was part; and it is to be presumed that the proper court in Georgia would not neglect its duty. We know that Georgia inherited the English system, of which courts of ordinary formed a part.—*Tucker v. Harris*, 13 Geo. 8.

5. The Alabama administrator had no possession or special property, on which to base his action. The conversion, if any, took place in Georgia.

6. The jurisdiction of the orphans' court of Barbour was first exercised, and therefore excluded every other jurisdiction. The removal of an administrator does not operate as a divestiture of jurisdiction of the subject-matter of the grant of administration.—*Dorman v. Ogbourne*, 16 Ala. 764; *Taliaferro v. Manning*, 3 *ib.* 675; *Dakin v. Hudson*, 6 Conn. 224; *Seymour v. Seymour*, 4 Johns. Ch. 210.

7. Independently of the question of the first exercise of jurisdiction, there was no authority in the Russell court to appoint an administrator in 1839. At common law, administration can only be granted of the personal estate; and there was no personal estate of the deceased, in Alabama, in 1839. Under the act of 1806 (*Clay's Digest*, 301, § 22), the right to grant letters, in the case of non-residents, was confined to the county in which the estate (personal) was situated; and the act of 1821 extended the jurisdiction to the case where lands devised lay in the county.

8. If administration be granted by a court not having rightful authority, the grant is generally void.—3 B. & C. 491; 1 Saund. 275; N. C. Rep. 105; 5 Iredell, 273; 5 B. & C. 491; 8 D. & R. 247; 1 Chitty's Pl. 489; 2 Greenl. Ev. § 340; Miller v. Jones, at January term, 1855.

9. The possession by the administratrix was not conclusive to prove a conversion by her intestate.

L. E. PARSONS, *contra*, contended,—

1. That the secondary evidence of the grant of letters of administration to James H. Shorter was properly excluded, because a sufficient predicate was not first laid for its introduction.—1 Greenl. on Evidence, 98; Scott v. Clair, 3 Campbell, 236; Jenner v. Joliffe, 6 Johns. 11; Canal Co. v. Hathaway, 8 Wend. 486; Hanbuck v. Baker, 10 Johns. 248; 2 Blackf. 243; 2 Saunders on Pl. & Ev. 783.

2. But, if James H. Shorter was administrator of Eli, the proof shows that he removed the slave beyond the jurisdiction of the court which appointed him, and converted him to his own use; and he cannot be allowed to protect himself against a suit by another administrator of the estate, on the ground that he holds the property as administrator, when he has repudiated the right of his intestate.

3. There was no error in the charge given.

GOLDTHWAITE, C. J.—The writ in the present case was sued out against Elizabeth Shorter and George Hargraves, as the administrators of James H. Shorter, was executed on Elizabeth Shorter, and returned not found as to the other defendant, as to whom the suit was discontinued in the declaration, on the ground that he had not been served with process, and resided in the State of Georgia. We have repeatedly held, that, where one administrator was out of the jurisdiction of the court, and not amenable to its process, he need not be joined in the writ (Williams v. Sims, 8 Port. 579; Owen v. Brown, 2 Ala. 127; English v. Brown, 9 Ala. 504); and, in the last case cited, we held, that the discontinuance as to one on whom service was not effected, on the ground of non-residence, was the same, in effect, as if the writ had not been sued out against him. Again, in Walker v. Cuthbert,

10 Ala. 213, we held, that, although a suit was improperly discontinued as to one defendant, it would not avail another, who appeared without objection, and defended the suit. Here no plea was interposed, which would present the question of fact, nor was the objection taken upon the evidence. This being the case, the marginal entry of the clerk, in naming a party who was not before the court, has no effect whatever, it being nothing more than a clerical mistake, requiring no amendment, as it occurred only in the entry of a continuance.—Grayham v. Roberds, 7 Ala. 719; Del Barco v. Br. Bk. at Mobile, 12 Ala. 238; Savage v. Walshe, 26 Ala. 619.

In relation to the exclusion of the transcript of the record from the court of ordinary of Muscogee county, Georgia, recognizing James H. Shorter as the administrator of Eli S. Shorter, we see no error. It may be conceded that, in case of the loss or destruction of a record, secondary evidence is admissible to establish it; but here the foundation on which such evidence should be based, appears to us to be wanting. We cannot judicially know that the court of ordinary of Muscogee county, in Georgia, had authority to confer administration, or that these powers were vested in it solely. Indeed, we know nothing whatever as to its jurisdiction or powers; and, in the absence of all evidence as to these points—without any testimony showing the original action of the court in Georgia as to the grant of administration—to admit secondary evidence of such action, would be extending the rule further than is warranted either upon principle or authority.

The same reasons which we have advanced in support of the exclusion of the transcript referred to, operate to sustain the action of the court in the rejection of the affidavits. They were, at the most, nothing more than the admissions of the party, made under oath; and as the grant of administration is a judicial act, it could not be proved in the mode proposed.—Morgan v. Patrick, 7 Ala. 185.

In the charge given by the court, by which the jury were instructed that the plaintiff was entitled to recover if they believed that the slave sued for was the property of Eli S. Shorter at the time of his death, and that the defendant had

him in possession and employment at the commencement of the action, the plaintiff having been appointed administrator of Eli S. Shorter before that time,—there was error. The suit was against the defendant below in her representative capacity; the declaration charged a conversion by her intestate in his lifetime; and the effect of the charge was, that a recovery might be had against the administratrix, as such, for a conversion by her since his death. If this charge could be sustained, the consequence would be, that an estate would be liable in damages for a wrongful act committed after the death of the intestate.

For the error we have noticed, the judgment must be reversed, and the cause remanded; and as the other questions presented on the present record may not arise on another trial, we do not consider it necessary to decide them.

WALKER vs. FENNER ET AL.

[DETINUE FOR SLAVES BY REMAINDER-MEN AGAINST PURCHASER AT SHERIFF'S SALE UNDER EXECUTION AGAINST TENANT FOR LIFE.]

1. *Husband's right to wife's chattels.*—In this State, prior to the passage of the several statutes securing to married women their separate estates, if slaves were bequeathed to one person for life, with a vested remainder to a married woman and others as tenants in common, and, with the assent of the executor, went into the possession of the person having the life estate, the interest of the wife vested in the husband, no adverse possession being shown, and he became tenant in common with the other remainder-men.
2. *Misjoinder of plaintiffs fatal.*—In detinue for a slave, by several remainder-men, tenants in common, after termination of precedent life estate, if the wife, whose interest is vested in her husband, be joined as co-plaintiff with him, the misjoinder is fatal to the entire action.

APPEAL from the Circuit Court of Lauderdale.

Tried before the Hon. THOMAS A. WALKER.

This action was brought by Thomas B. Fenner, Joseph F. Fenner, Richard H. Fenner, Julius Johnson and Mary H.

Johnson, his wife, Margaret E. Fenner, Ann M. Fenner, and Lucy M. Fenner, (the two last named being infants, who sued by their next friend, Thomas B. Fenner,) against Leroy P. Walker, to recover two slaves, which they claimed under the will of John Howson, who was the uncle of their father, Robert Fenner. Said will was executed on the 18th March, 1842, in Halifax county, North Carolina, and contained the following clause: "The residue of my property, of every description, I wish to be equally divided,—the one half of which I give to my nephew, John H. Fenner, and his heirs, forever; the other half of such division I lend to my nephew, Robert Fenner, of Alabama, during his natural life, for his sole and exclusive benefit and support, and for no other purpose, that such property as I lend to the said Robert, or its annual increase, shall be in no wise subject to the debts of the said Robert which may have been contracted by him, or those contracted hereafter; and, at the death of the said Robert, I give such portion of my estate as I have hereby loaned to him, to his children, to be equally divided among them, to them and their heirs forever."

On the trial, the parties agreed on the facts, which are thus stated in the bill of exceptions: "That the negroes sued for are of those conveyed by the will of John Howson, deceased, executed on the 18th March, 1842, in Halifax county, North Carolina"; "that said testator, at the time of making and publishing said will, resided in said county of Halifax, North Carolina, where the said negroes then were in his possession, and that he resided and died there in November, 1842; that said will was duly and legally probated in said county of Halifax, in November, 1842; that on the 23d March, 1843, with the assent and approval of the executors of said testator, a division of the property belonging to his estate, under and conformably to said will, was made by the proper court of said county, which division was confirmed by said court in May, 1843; that on this division the negroes sued for were allotted and set apart, according to the terms and stipulations of said will, to Robert Fenner, one of the legatees named in said will, and sanctioned and assented to by the said executors, and then and there delivered by them to said Robert Fenner, to be owned and held by him subject

to the provisions of said will, and were removed by him from said county of Halifax to Lawrence county, Alabama, in April, 1843; that the said Robert Fenner, at the time said will was executed, and at the probate thereof, and for many years anterior, resided in and was a citizen of said county of Lawrence in this State, together with the present plaintiffs, all of whom (except the said Julius Johnson) are his children, and were living with him when he received said negroes; that the said Julius Johnson married the said Mary H., a daughter of the said Robert Fenner, in December, 1843, in said county of Lawrence, and from thenceforward lived with the said Robert Fenner, together with the other plaintiffs in this suit, as members of his family, up to the time of the sale to the defendant hereinafter mentioned."

"It is further admitted as a fact, that the said Robert Fenner, immediately on obtaining possession of said negroes under said division, that is to say in April, 1843, brought them to said county of Lawrence, where they remained continuously on his plantation,—he claiming and holding them subject to the provisions of said will, and recognizing and admitting the remainder over in these plaintiffs after the termination of his life estate,—until the 9th February, 1846, when they were levied on by the sheriff of said county of Lawrence, as the property of said Robert Fenner, by virtue of sundry executions against him, issued upon judgments theretofore rendered against him; that said negroes were sold by said sheriff, in pursuance of said levy, as the property of said Robert Fenner, on the 9th March, 1846, and were purchased by the defendant at said sale. It is further admitted as a fact, that said will gave to said Robert Fenner a life estate only in said negroes, with a vested remainder over to his children, the present plaintiffs; that said Robert received and held said negroes in subordination to the remainder, and always recognized and asserted the title of the remainder-men; that said will was never probated in Alabama, nor was it ever recorded in Lawrence county until September, 1844; that at the time of the said levy, and ever since the said division in North Carolina, said Robert Fenner had been and was in possession of said negroes, in said county of Lawrence, always holding them in subordination to

the remainder-men; that said Robert Fenner died, insolvent, on the 19th September, 1847; that said negroes are worth \$1,000 each, and their annual hire since the defendant's purchase \$80; that said negroes have been in the defendant's possession since the 1st January, 1848,—he claiming them as his property ever since his said purchase, though he did not have possession of either of them in 1846 and 1847, having hired them out during those years; that the said judgments against said Robert Fenner were valid and subsisting, and were rendered at the March term, 1845, of the circuit court of Lawrence; that said executions were regularly and properly issued, and said sale regularly and legally conducted; and that a demand was made of the defendant, for said negroes, soon after the death of said Robert Fenner."

The defendant demurred to the evidence, in short by consent, and the plaintiffs joined in the demurrer. The court held the evidence sufficient, and therefore overruled the demurrer; and the defendant excepted. The overruling of the demurrer, and the rendition of judgment for the plaintiffs, are now assigned as error.

R. W. WALKER, for the appellant:

The wife of Julius Johnson was not a proper party, and the misjoinder was fatal to the suit. The remainder being vested; the interest of Mrs. Johnson, *eo instanti* the marriage, became the property of her husband, and he alone can sue for its recovery.—1 Chitty's Pleadings, 33; Broom on Parties, 158, § 279; 3 Bacon's Abridgment, 134; 8 Porter, 36, 40; 4 Ala. 350; 10 *ib.* 819-21; 17 *ib.* 731, 676; 15 *ib.* 373; 1 Hill's Ch. R. 404; 6 Watts, 301; 1 Stephens' N. P. 740; 1 Hawks, 67; 2 Barbour's S. C. R. 352; Gibson v. Land, 27 Ala. 118, and cases there cited in opinion of Rice, J.

DAVID P. LEWIS, *contra*:

1. It will not be controverted, that the wife, whenever her right by survivorship is not extinguished, may be joined in a suit for her personal estate. Is Mrs. Johnson's right by survivorship extinguished? Does the marriage of the wife, pending the life estate, and after the executor has assented to the same, *ipso facto* extinguish this right in her estate in remainder?

2. The wife may be joined in a suit for all personal estate in action that accrues to her during coverture.—2 Roper on H. & W. 134—5; 1 Chitty's Pleadings, 30; 9 Ala. 720. She must join for such debts, &c., as were due to her before marriage, and may join for a conversion of her chattels after marriage.—Roper, *supra*; 1 Bright on H. & W. 34—5.

3. The possession by the husband of the wife's personal estate, to exclude her right of survivorship, must be an actual or potential possession.—Johnson v. Wren, 3 Stew. 17; *ib.* 375; Hogan v. Bell, 4 Stew. & P. 286; Mason v. McNeill, 23 Ala. 213; 2 Kent's Com. 115—6; 1 Bright on H. & W. 34; Reeves Dom. Rel. ch 1.

5. Constructive possession is not favored in law to defeat the wife's right of survivorship.—Authorities cited *supra*. It is favored to vest survivorship in the husband, as against the wife's administrator.—Magee v. Toland, 8 Porter, 42; Pitts v. Curtis, 4 Ala. 350; 16 *ib.* 343; 17 *ib.* 729—30; Clancy on M. W. 147; 5 B. Monroe, 556.

5. Bequest of slaves to A. for life, with remainder to B., the wife of C.; *held*, that if C. die without reducing the slaves to possession, or appropriating or disposing of them, B. takes them by survivorship, and not C.'s administrator.—Mason v. McNeill, 23 Ala. 213; 2 Litt. 281; 4 *ib.* 356; 7 B. Monroe, 216.

6. In slaves bequeathed as above, the wife's right of survivorship remains, pending the life estate, even against an assignee for value.—1 B. Monroe, 152; 7 *ib.* 257, 535; 2 H. & M. 392; Keyes on Chattels, § 446. And that her equity to a settlement, on the above case, is not destroyed, see Thomas v. Kennedy, 4 B. Monroe, 235—8.

7. A reduction to possession, which would give the husband the right to the property by survivorship, as against the wife's administrator, does not necessarily extinguish her right of survivorship, as against his administrator.—Mason v. McNeill, 23 Ala. 216.

8. So far from marriage, *ipso facto*, extinguishing the wife's right of survivorship in her remaining or reversionary estates, this right of the wife will prevail, when the husband dies pending the life estate, against the assignee in bankruptcy, and against an assignee for value.—9 Vesey, 87;

1 Bright on H. & W. 81-86. And though the estate be immediately recoverable, still, if the husband die before this is done, the wife takes by survivorship; and the husband cannot assign or release his wife's annuity beyond his life, she surviving.—1 Bright, 74; 2 *ib.* 440.

9. The husband cannot, by sale or transfer, bar his wife's reversionary interest in personal property; nor can husband and wife, by deed, destroy her right to the same by survivorship.—Clancy, 146-7, and cases there cited.

10. The husband cannot absolutely assign his wife's choses in action, either legal or equitable, even for value. He can only assign the right which he has—viz., the right to reduce them to possession; and if he die before reduction to possession by the assignee, the wife takes by survivorship, as she would have taken had there been no assignment.—1 Bright, 77-85.

11. And her right by survivorship, in the case of remaining or reversionary interests, seems stronger than in the case of a chose in action.—4 B. Monroe, 237-8.

12. If the husband assign his wife's legal choses in action (*i. e.* those recoverable at law), the assignee may sue for them in the name of the husband and wife.—8 Beavan, 211; 1 Bright, 79.

13. The case of *Gibson v. Land*, 27 Ala. 120, holds that the husband, in cases analogous to this, *may* sue alone, but not that he *must* sue alone.

RICE, C. J.—The decision of this case cannot be influenced by any of our statutes, in relation to the rights which the husband acquires by the marriage to the property of his wife; because the facts, upon which the rights of the parties now before us depend, occurred before the adoption of any of those statutes.

When an estate in remainder, of slaves, has *vested* in the wife under a will, and, by the assent of the executor, has become a *legal* interest, and the possession is with the person having the precedent particular estate, and no adverse possession is shown, such vested legal interest of the wife, according to our decisions, passes by the marriage to the husband; and if her said interest be that of a tenant in common with

others, then, on the marriage, she ceases to be a tenant in common with them, and her husband is substituted for her as a tenant in common with them.—*Magee v. Toland*, 8 Porter, 36; *Pitts v. Curtis*, 4 Ala. R. 350; *Broome v. King*, 10 Ala. R. 819; *Chambers v. Perry*, 17 Ala. R. 726; *Gibson v. Land*, 27 Ala. R. 117.

We are aware that, in this respect, there are decisions of the courts of some of our sister States opposed to our decisions, and that some of the reasoning of our own court in the case of *Mason v. McNeill*, 23 Ala. R. 208, is also opposed to what we have above stated to be the law as settled by our former decisions.—*McBride v. Choate*, 2 Iredell's Eq. Rep. 610; *Whitehurst v. Harker*, 2 Iredell's Eq. Rep. 293; *Weeks v. Weeks*, 5 *ib.* 111; *Swanson v. Swanson*, 2 Swan's Rep. 446; *Hall v. McLain*, 11 Humph. Rep. 425.

But our former decisions, to which we adhere, are sustained by several decisions of the courts of our sister States, and by what we deem far more satisfactory—uncontroverted elementary principles; some of which we will now state: By marriage, the husband and wife are as one person in law. There can be no partnership, nor community of goods, between them. Her personal chattels in possession vest absolutely in him. In the absence of any adverse possession, the possession of the tenant for life, under the instrument creating the estate for life and the remainder in a personal chattel, is the possession of the remainder-man. The possession of one tenant in common is the possession of all of them, until there has been a conversion or ouster by one of them.—*Pettyjohn v. Beasley*, 4 Dev. Rep. 512; *Stephens v. Doak*, 2 Iredell's Eq. Rep. 348; see also the authorities cited in my opinion in *Gibson v. Land*, 27 Ala. Rep. 117; *Pollard v. Merrill*, 15 Ala. R. 169.

All the plaintiffs in an action must be entitled to recover; otherwise none of them can recover in it.—*Hardeman v. Sims*, 3 Ala. R. 747; *Cochran v. Cunningham*, 16 *ib.* 448; *Patton v. Crow*, 26 *ib.* 426.

It results from what we have above said, in connection with the admitted facts, that Mary H. Johnson, the wife of Julius Johnson, had no interest in the slaves sued for at the commencement of this suit, and that she was not entitled to

recover upon the facts admitted. Making her a plaintiff with the others, was a misjoinder of plaintiffs; and such misjoinder was, *per se*, enough to defeat a recovery upon the facts shown in this record.

The court below, erred in overruling the demurrer to the evidence; and its judgment is therefore reversed, and the cause remanded.

MACHEM vs. MACHEM.

[BILL IN EQUITY BY WIDOW AGAINST HER HUSBAND'S EXECUTOR, FOR ALLOTMENT OF SLAVES AS HER SEPARATE ESTATE, OR DISTRIBUTIVE SHARE, AND TO ENJOIN ACTION AT LAW FOR THEIR RECOVERY.]

1. *Jurisdiction of equity to decree division of slaves belonging to decedents' estates.*—A widow, or other distributee of an estate, who retains possession of slaves on the ground of an attachment to them as family negroes, cannot come into equity to enjoin an action at law by the personal representative for their recovery, and to have them allotted to her as a part of her distributive share; the statute law having provided another forum to make a division in such case.
2. *Reformation of will in equity.*—A will cannot be reformed in equity, so as to make it create a separate estate in a married woman, on proof of an agreement, prior to her marriage, between the testator, who was her father, and her intended husband, that the will of the former should exclude the husband's marital rights.
3. *Construction of will.*—The will which was construed in *Machen v. Machen*, 15 Ala. 373, again examined, in a suit between the same parties, and the former construction adhered to.
4. *Declarations made through ignorance or mistake.*—In a suit between an executor and the widow of his testator, the declarations of the testator, founded in ignorance or mistake as to his rights, to the effect that certain slaves, which he held under the will of his wife's father, were her separate property, should not be received to divest the property out of his executor.
5. *What constitutes reduction to possession by husband.*—Where slaves are bequeathed to a married woman, by words which do not create a separate estate in her, and are delivered to her by the executor, as her separate property, with the consent of her husband, who thenceforward until his death recognizes and treats them as belonging to his wife, and asserts no claim in himself,—this is not a reduction to possession as husband, and his marital rights do not attach.

6. *Jurisdiction of equity where remedy at law is adequate and complete.*—A widow cannot come into equity, to enjoin an action at law by the personal representative of her husband, for the recovery of slaves which were bequeathed to her, and which her husband never reduced to possession, as husband, in his lifetime: her remedy at law is adequate and complete.

[2.] *Proof without allegations.*—No decree can be rendered on proof which is not applicable to any of the allegations of the bill.

7. *Mistake no excuse for failure to reduce to possession.*—If the husband fail to reduce to possession during the coverture slaves bequeathed to his wife, because he erroneously supposed that the will created a separate estate in her, his mistake does not avoid the effect of the failure, and his marital rights do not attach.

APPEAL from the Chancery Court of Cherokee.

Heard before the Hon. JAMES B. CLARK.

This bill was filed by Mrs. Jane Machem, the appellant, against William Machem, as the executor of her deceased husband, James Machem, to enjoin an action at law for the recovery of certain slaves, and to have them set apart as her separate estate under the will of her father, Merry Hall, or as her distributive share of her husband's estate. The bill was filed in October, 1849; the action sought to be enjoined was before this court, on writ of error, at its January term, 1849, and may be found reported in 15 Ala. 373; and the clause of the will, under which the complainant claims the slaves, is in these words: "I leave to Jane Machem two negroes, Tamar and Prince, during her life, then to her bodily heirs; if there should be no heirs, for the said negroes and increase to go back to the heirs, and an equal division made amongst the heirs."

The bill, as amended, alleged that said James Machem, before his marriage with complainant, and when he asked her father for her hand in marriage, was distinctly informed by the said Merry Hall that it was his intention, by his last will and testament, to settle her portion of his estate upon complainant for her separate use, and to exclude the marital rights of her husband; that said James expressed himself satisfied with this arrangement, and consented that the property should be so settled; that said Merry Hall, after the intermarriage between complainant and said James Machem, departed this life, in South Carolina, where he resided, after having made and published his last will and testament, which

was duly admitted to probate after his death, and letters testamentary granted to the defendant, as executor, by the county court of Cherokee county, Alabama; that the testator intended, by the clause of his will above quoted, to give complainant a separate estate in the slaves during her life, and, in the event of her death without children, that the slaves should then go to the testator's heirs; that this was the construction put on the will, both by the testator and by said James Machem; that said James, after the testator's death, refused to receive the slaves, and directed the executor to deliver them to complainant as her separate property; that the executor accordingly delivered them to her, and she held them as her own separate property during the life of her said husband, who uniformly disclaimed all interest in them, treated and recognized them as belonging to his wife, required her to pay their taxes and other necessary expenses, and kept them separate from his own negroes; that said James made no disposition of said slaves by his last will and testament, declaring to a friend that he considered them his wife's property, that he desired her to have them, and that he would not interfere with her rights by attempting to bequeath them; that said James was possessed of a large estate at the time of his death, and left several children by a former marriage; that complainant dissented from his will within the time prescribed by the statute; that the executor has sold most of the personal estate, and paid most (if not all) of the outstanding debts; that he has commenced suit against complainant, in the circuit court of Cherokee, to recover these slaves, to whom she is much attached as they are family negroes; and that more than eighteen months have elapsed since the grant of letters testamentary to the defendant. The prayer of the bill is, "that said negroes may be set apart to complainant under the will of her said father and the intention of her said husband, or as her portion of the estate of her said husband under the laws of distribution; that the defendant be perpetually enjoined from proceeding with his said action at law; and for such other and further general relief as may seem meet and consist with equity."

The executor answered the bill,—denying that the will of Merry Hall was intended to create a separate estate in the

slaves in the complainant, or that her husband so recognized and treated them, or that possession was delivered to her by the executor, or that her husband uniformly disclaimed all interest in them, or that he intended complainant to have them after his death; and alleging, on the contrary, that the legal effect of the will was to vest the property in the husband, that he reduced the slaves to his possession, and that, if he ever declared them to be the separate property of his wife, such declarations were made in ignorance of his rights, and are therefore of no binding effect.

The evidence taken in the cause is quite voluminous, but it is not deemed necessary to give an abstract of it.

The chancellor held, 1st, that the complainant could not retain the possession of the slaves against the demand of the executor, and ask a court of equity to set them apart to her as her distributive share of the estate; 2d, that the alleged agreement between the complainant's father and husband, prior to her marriage, even if proved, could have no effect on the construction of the father's will; 3d, that the will did not create a separate estate in the complainant; 4th, that the evidence was not sufficient to prove the allegation that the husband refused to receive the property, or that he always disclaimed any interest in it; 5th, that the declarations of the husband, after reducing the property to possession, to the effect that it belonged to his wife, would not, if made through ignorance or mistake of his rights, create a separate estate in the complainant; and, 6th, that his failure, either through ignorance or mistake, to reduce the property to possession as husband, prevented his marital rights from attaching. He therefore dismissed the bill, but without prejudice to the right to file another, and dissolved the injunction; and his decree is now assigned as error.

ALEX. WHITE and J. B. MARTIN, for appellant:

The property in the slaves in controversy, at law, is in the defendant, as was decided in *Machen v. Machen*, 15 Ala. 373; but it is there strongly intimated that the complainant might have relief in equity, and that intimation is reiterated in the case of *Williams v. Maull*, 20 Ala. 721. The testimony in this record is stronger than it was on the trial at

law, and is sufficient, upon legitimate argument, to sustain the bill.

These slaves, being a legacy from the wife's father, are a mere chose in action, until the husband asserts his marital rights; and if he does not do this in his lifetime, the right of property does not go to his personal representative, but survives to the wife; and he must reduce them to possession with the intention of asserting his right as husband, and not as trustee.—*Andrews & Bro. v. Jones*, 10 Ala. 400; *Hogan v. Bell*, 4 S. & P. 286; *Jennings v. Blocker's Adm'r*, 25 Ala. 422; 4 Rawle, 468; *Wall v. Tomlinson*, 16 Vesey, 413; *Blount v. Bestland*, 5 *ib.* 515; *Baker v. Hall*, 12 *ib.* 497; 7 *ib.* 294; 1 Wms. on Ex'rs, 616; *Clancy on Rights of Married Women*, 139-40.

In this case, the evidence abundantly proves that the husband never received the property as husband, but, on the contrary, at the time it was delivered to his wife by the executor, he disclaimed any interest in it, and so treated it during his whole life; always showing, both by act and declaration, that he regarded it as his wife's property. He suffered her to control the slaves, made her pay their taxes, doctor's bills, and other necessary expenses out of her own money, and in all respects, so far as was practicable, treated them as her separate property; and these acts and declarations are admissible evidence against the defendant.—*Andrews & Bro. v. Jones*, 10 Ala. 427; *Burnett v. Branch Bank*, 22 *ib.* 642.

Courts of equity recognize and enforce contracts between husband and wife, which a court of law cannot regard; and whenever the conduct of the husband is such as to lead, fairly and reasonably, to the conclusion that he had released his rights in favor of his wife, or had set apart property for her separate use, or had made a gift of the property to her, the right of the wife will be sustained, in a contest between her and the personal representative of her husband.—*Williams v. Maull*, 20 Ala. 721; *Puryear v. Puryear*, 12 *ib.* 13; *Gamble v. Gamble*, 11 *ib.* 974. Where stock was purchased by the husband, in the name of himself and wife, on his death it was decreed to her as survivor.—*Rider v. Kidder*, 10 Vesey, 367; also, *Sledge v. Clopton*, 6 Ala. 589. The bill does not,

in terms, allege a gift, or a relinquishment, or a failure on the part of the defendant's testator to assert his marital rights; but it charges the facts which, in law, constitute a relinquishment or gift, and the court will so declare it.—*Bishop v. Bishop*, 13 Ala. 475; *Eldridge v. Turner*, 11 *ib.* 1050; *Gilchrist v. Gilmer*, 9 *ib.* 985.

It is competent for the owner of property to release any right, to any kind of property, which he has not in possession; and equity will uphold a release or relinquishment by a husband to his wife.—*Sheppard's Touchstone*, vol. 1, p. 322; *Andrews & Bro. v. Jones*, 10 Ala. 427, 461. A relinquishment of personal property may be made as well verbally as in writing; and if complainant's husband, at the time it was delivered by the executor, had made a written relinquishment of it to his wife, there can scarcely be a question of its validity, especially when it is remembered that it was never revoked or repudiated by him.

The complainant's father bequeathed these slaves, under the belief that he was securing them to her sole and separate use; and the husband received them under the same belief, and with full notice. In such case, a trust arises in favor of the wife, which a court of equity will enforce.—*Betts v. Betts*, 18 Ala. 787.

This is an equitable fund, which could not be reached, in the hands of Merry Hall's executor, in a court of law; and a court of equity, before it would enforce the rights of the husband, would require him to make a reasonable provision for the wife.—*Upchurch v. Norsworthy*, 12 Ala. 532; *Andrews & Bro. v. Jones*, 10 *ib.* 461; *Terrell v. Green*, 11 *ib.* 216; *Inge v. Forrester*, 6 *ib.* 421; 2 *Story's Equity*, § 1403. It is competent for the husband to do voluntarily what a court of equity would have compelled him to do; and the provision was a reasonable one, under the circumstances in evidence.

The circumstances of the case authorize the court to presume a gift by the husband to the wife, which will be good as against the husband's executor.—*Puryear v. Puryear*, 12 Ala. 13; *Andrews & Bro. v. Jones*, 10 *ib.* 427; *Williams v. Maull*, 20 *ib.* 721.

In decreeing in favor of the complainant, the court would

but carry out the intention of her husband, who, if he had not supposed that these slaves already belonged to his wife, would have bequeathed them to her. If any mistake then was made, the husband was not misled by it, but did that only which he would have done in more unquestionable form had he known his rights.—Juzan v. Toulmin, 9 Ala. 662; Jones v. Watkins, 1 Stew. 81; 1 Story's Equity, § 110.

The complainant has not an adequate and complete remedy at law, and is therefore entitled to come into equity. Her claim is based not merely on the fact that her husband never asserted his marital rights, but on the additional ground that he relinquished or gave the negroes to her as an equitable provision, and that this fact is not available at law.—Williams v. Maull, 20 Ala. 732; Anderson v. Hooks, 9 *ib.* 704; Teague v. Russell, 2 Stew. 420.

D. W. BAINE and J. J. WOODWARD, *contra*:

1. In equity, the complainant can hold the property by virtue of some trust in her favor, which a court of law could not establish.

2. That the will of Merry Hall does not create such a trust, see Machen v. Machen, 15 Ala. 373; and that the will cannot be reformed, see 1 Story's Eq. § 179, and cases cited.

3. The bill does not pretend that complainant's husband, by his declarations, ever created, or attempted to create, any trust in her favor in the property; but, on the contrary, it positively negatives the idea that he ever assumed to do anything whatever with it.

4. The only effect of the admissions and acts of the husband, charged in the bill, would be to prevent his marital rights from attaching; in which event, complainant, as the survivor, holds the legal title, and has a full and adequate remedy at law.—Puryear v. Puryear, 12 Ala. 13.

5. The allegations of the bill, as to the husband's disclaimer of his marital rights at the delivery of the property, are not supported by the proof. The witnesses Milly and Thomas Hall are positively contradicted by Paine; besides, they vary materially from each other, and their evidence is on its face unreliable. The bill alleges a refusal by the husband to receive the property as his own, and a direction to

deliver it to complainant, while the proof shows only an agreement to hold the property as his wife's separate estate; and this variance is fatal.—Owens v. Collins, 23 Ala. 845; Flake & Freeman v. Day & Co., 22 *ib.* 132; Gibson v. Carson, 3 *ib.* 421; Julian v. Reynolds, 11 *ib.* 960.

6. The admissions and declarations of the husband were made in ignorance of his marital rights, and cannot affect him.—13 B. Monroe, 273; Smith v. Shackelford, 9 Dana, 476; Leferce v. Robinson, Littell's Select Cases, 22; Moore v. Hitchcock, 4 Wend. 292; Hawley v. Bennet, 5 Paige, 104; Freeman v. Boynton, 7 Mass. 488; Warden v. Tucker, *ib.* 452; Gamble v. Gamble, 11 Ala. 976; 1 Story's Eq. § 130.

7. The delivery to the wife, unaffected by the declarations of the husband, vested the property in him.—Machen v. Machen, 15 Ala. 373. This decision is conclusive of the law of this case; but, even if it were permitted to go behind it, it is amply sustained by authority.—Magee v. Toland, 8 Port. 36; Pitts v. Curtis, 4 Ala. 350; Chamber v. Perry, 17 *ib.* 729; Hopper v. McWhorter, 18 *ib.* 229; McDaniel v. Whitman, 16 *ib.* 344; Lenoir v. Raney, 15 *ib.* 669; Whitaker v. Whitaker, 1 Dev. 310; Granberry v. Mhoon, *ib.* 456; Pettijohn v. Beasley, 4 *ib.* 512. In these cases, no actual intention of asserting his marital rights was shown by the husband; and yet it was held that they attached, and, in most of the cases, as against the wife surviving.

8. As to the rights of the surviving wife, the maxim applies, *equitas sequitur legem*.—1 Madd. 477-8; 1 Story's Eq. § 64; Law Library, vol. 59, top p. 106.

CHILTON, C. J.—We think the learned chancellor has, in the main, taken a very correct view of this case, and we fully concur with him in the following propositions:

1. That, as widow of James Machem, the complainant has no right to hold on to the slaves in controversy, and resort to a court of equity to have them set apart as so much of her share of her husband's estate. The statute law has provided another forum for making the distribution, in cases where a division or allotment of personal chattels *in specie* is required to be made of decedents' estates; and, although there are cases where the chancery court may rightfully exercise juris-

diction of this kind, this does not fall within that category. No lien upon, or equitable right to the slaves being shown, it is very clear that the plaintiff's bill, so far as it depends upon her right as widow or distributee of James Machem, must fall to the ground.

2. We agree that the will of Merry Hall cannot be reformed, so as to vest in the complainant a separate estate, by reason of any agreement entered into between said testator and the husband of complainant before the will was made, that it should contain such a provision. The will is ambulatory. The testator could, and *non constat* but that he did, change his mind. Be this as it may, we must look to the will, and construe it according to the plain import of its terms. If these contain no ambiguous expressions, requiring explanation by proof, we are not permitted to receive oral proof, to alter, add to, or vary its terms.—Jarman on Wills, 342, *et seq.*; *ib.* 346–349, and note.

3. It is further very clear, and so it was decided when this same will was presented before this court for construction in 15 Ala. Rep. 373, that in the bequest to complainant of the slaves in controversy, no separate estate is created. It only remained, therefore, that the husband, James Machem, should reduce the slaves into his possession, *quoad* husband, to complete his right of absolute property in said slaves.

4. We also concur with the chancellor, that any declaration made by James Machem, going to show that the property was the separate estate of his wife, founded in ignorance of his rights, should not be received to divest the property out of his administrator. And here we take occasion to say, that it is very clear he was mistaken, as to the legal effect of the bequest of the property to his wife by the will of her father. He supposed it vested her with a separate property, and effectually excluded his marital rights. We have seen it did not. But we shall recur to this subject again, when we come to treat of the effect of these declarations in another aspect.

5. The question, however, still remains, Did the husband, James Machem, ever reduce the property into his possession, *as husband*?—Bell on H. & W. 49–50; 1 Bright on H. & W. 34; Co. Lit. 351, b. We think the proof set out in this record shows that he did not. It establishes, with reasona-

ble certainty, that it was delivered by the executor of Merry Hall to the complainant, as for her separate property, if not by the positive direction, at least by the consent of her said husband, James Machem, and from that day forth, if his declarations are to be accredited, he regarded and treated the property as belonging to his wife, and as having no claim to it himself. Had he demanded the property of Humphrey Hall, the executor, it does not appear that he could have obtained the executor's assent to the legacy, as vesting a title in him. The assent was to the wife, as for her sole and separate use; and the property being thus delivered to her, the concurrence in the gift by the husband, and his continued treatment of it as her property whenever he is heard to speak of it, clearly show that he laid no claim to it as husband, but that it should remain to the wife as her property. This the husband might well have done, whether the will gave him the property through his wife, or not. He had his election to possess himself of the property as husband by suit or otherwise; or, after the wife obtained the actual possession, we will not say that he might not, even after consenting to her receipt of it as her separate property, have asserted his claim, and have held it as husband. But the proof shows that he did not do this. At least, complainant shows how she received it, and how he regarded it as hers, and held it for her; and if he ever changed his mind, the defendant should have proved that, as the complainant is not required to prove that he had not changed his mind, having shown his settled purpose,—this being a negative which she could only prove by the character of proof which she has adduced. His declaration, as proved by Mr. Cunningham, is too indefinite and weak to create a counter presumption, especially as it conflicts with more specific declarations made to the same witness.

6. It follows, however, if this be a correct view of the facts, and the marital rights of the husband never attached to the slaves, that the complainant has no need to resort to chancery; for, upon the death of her husband, her remedy is complete at law. The decision of this court in 15 Ala., above referred to, was predicated upon the facts then presented, showing a delivery to the wife without more. The

marital rights of the husband consequently became vested, and the property absolutely his *eo instanti*. This record varies the facts, showing the delivery to be for her separate use, by the concurrence of the husband, followed up by his oft-repeated declarations, that the property was her's, and that he was merely protecting it for her. As the law court furnishes a complete and adequate remedy in this aspect of the case, chancery will not entertain jurisdiction.

It is only upon the principle, that the husband's marital rights did attach, and that he subsequently made a gift, provision, or settlement of the slaves upon the complainant, that she could resort to this court, after his death, to enjoin the action of his personal representative for their recovery. The bill is not filed upon any such agreement, or to enforce any such gift by way of providing for her; and, if we concede that his declarations tend to establish the existence of a gift to the wife, there being no allegations in the bill to which the proof would be applicable, no decree can be rendered upon it.—3 Ala. Rep. 421; 11 *ib.* 960; 13 *ib.* 681; 22 *ib.* 132; 23 *ib.* 845; 25 *ib.* 212; 6 John. 565; Story's Eq. Pl. § 257.

7. The fact that James Machem was mistaken as to the legal effect of the bequest to his wife, and that his declarations were predicated upon such mistake, (if such be the fact,) would, as we have suggested, destroy the effect of such declarations as indicating an intention to part with his right to the property, and to vest that right in his wife. But, if he refused to accept the gift as one to himself, and conceded the right of his wife to accept it as of her separate estate,—directed the executor so to deliver it to her, and the same was so delivered, and said Machem held it as her property, as shown by his repeated declarations qualifying his possession, then it is wholly unimportant whether his declarations and conduct were founded in a mistaken view of his rights or not; for *he has not reduced the property into possession as husband*. That his failure to do so was the consequence of a mistake, does not change the result, any more than delay in the collection of a debt due the wife *dum sola*, under the mistaken opinion by the husband that it would be paid to him without suit, or would go to his personal representative in the event of his death before its collection. The mistake, in

either case, could not operate to confer upon the husband, as such, the property or the money. No question as to constructive possession arises in this case, and hence we do not notice that position of the counsel. The husband either had, or had not, possession *as husband*. If he had not, the defence is legal; if he had, but conceded the property to his wife, this matter of equitable concession or agreement must be averred in the bill, before it can be made the foundation for a decree. See authorities above.

We have thus been particular in noticing the several phases in which this case is presented, to avoid misconception, as well as to enable the parties to understand their rights, and the primary court to adjudicate them.

It follows that there is no error in the decree of the chancellor in dismissing the bill. It is consequently affirmed.

HENRY vs. JONES.

[TRESPASS QUARE CLAUSUM FREGIT TO RECOVER DAMAGES FOR PULLING DOWN GATE AND ERECTING FENCE ON PLAINTIFF'S LAND.]

1. *Right to repair partition fence*.—Where there is a partition fence between two adjacent land proprietors, or a fence which, although built entirely on the land of one, is recognized by both as a partition fence, each one has a right to enter on the land of the other for the purpose of repairing it.
2. *Estoppel in pais*.—The recognition by the parties, as a partition fence, of a structure which is built entirely on the land of one proprietor, operates as an estoppel *in pais*, and prevents either from complaining of any act done by the other which would have been lawful if the fence had been on the division line.
3. *Right to repair gives no right to destroy*.—If a gate, erected on the land of one proprietor, is also recognized as a part of the partition fence between him and the adjacent proprietor, the right to repair it as a fence does not authorize its destruction as a gate; and an entry for the latter purpose is not protected by the statute.

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. JOHN GILL SHORTER.

This action was brought by John B. Henry against Samuel Jones, in September, 1852, to recover damages for the defendant's wrongful act in entering on plaintiff's land, pulling down a gate, and erecting a fence thereon, thus obstructing plaintiff's right of way. The only plea was the general issue, with leave to give any special matter in evidence.

"On the trial," as the bill of exceptions states, "it was proved that the plaintiff, early in the year 1850, became the owner in fee of the lands described in his declaration, and has ever since owned, used, and possessed them as his plantation; that he thus became the owner of said lands by purchase from one Beard; that the defendant, early in the year 1851, by purchase and conveyance from one Fraley, became the possessor and owner in fee of a section of land adjoining plaintiff's said lands; that defendant, whilst he was on a treaty with said Fraley for his land, promised plaintiff that, if he succeeded in buying the land from Fraley, he would let plaintiff have forty acres of it, at a price to be afterwards agreed on, if it did not conflict with his interest; that after defendant had made said purchase from Fraley, and early in 1851, he and plaintiff tried to agree upon and designate the forty acres which defendant had so promised to let plaintiff have, but had not agreed; that plaintiff thereupon told defendant, that all he wanted said forty acres for was to procure a right of way for himself, his family and vehicles, from his dwelling-house to his said plantation, over and through the land bought by defendant from said Fraley; that defendant thereupon told plaintiff, that, if that was all he wanted, he should have a right of way through said land, if he would erect and keep up a good gate at the place where such road would pass through and intersect the fence which separated the cultivated land of plaintiff from the cultivated land of defendant, and would keep said gate closed or fastened; that plaintiff accepted this offer, and thereupon both parties agreed to it; that this agreement was verbal, and no writing was ever executed between the parties; that defendant's said land was situated between plaintiff's dwelling-house and his said plantation; that the distance from his dwelling-house to his said plantation, by the road so agreed on, was about a mile, and without this road, some three or four miles; that plaintiff,

immediately after said agreement, built a bridge over a creek running through defendant's said land, and also erected a gate at the place where the road so agreed on intersected and passed through the fence which separated the cultivated lands of the plaintiff and defendant; that said gate was hung on hinges, on a large post prepared and imbedded for the purpose; that said gate and post were erected entirely by plaintiff, and were entirely on his said plantation, (being the land described in his declaration,) but only a few feet from the line which divided his plantation from the defendant's said land; that the fence which separated their cultivated lands was built, before either of their said purchases, and some five or six years ago, by said Fraley, with the assent of said Beard, and upon the line as run by a county surveyor; that a considerable (if not the greater) part of said fence was in fact on the line, but the panels of the fence immediately adjoining said gate, as well as said gate and post, were entirely on plaintiff's land described in his declaration; that said road was opened in 1851, as soon as said gate was erected, and said bridge built; that it was used in 1851, and until May, 1852, when said bridge was washed away by a large freshet; that plaintiff, soon after said bridge was washed away, commenced getting timbers to rebuild it, whereupon defendant, early in June, entered upon plaintiff's said land, took down said gate, and built a fence in its place across said road, uniting the fence as it was before the erection of the gate by the plaintiff; that defendant, a few days afterwards, admitted to witness, who was a brother in the church, that he had done this, and that in so doing he had done wrong; that defendant stated, in this same conversation, that he had agreed to let plaintiff have the road on condition that he would put up a good gate and keep it closed, and that plaintiff had failed to comply with this condition. There was evidence, also, tending to show that, at several times before said gate was taken down by defendant, it was in bad order, and insufficient to keep stock out of defendant's field, if there was any stock in plaintiff's field; that in 1851 some stock had got out of plaintiff's field into defendant's field; that the outside fence of plaintiff's field was in bad

order; and that defendant's crop had thereby been slightly injured.

"This being all the evidence in the cause, the court charged the jury, that if the gate and fence in controversy divided the cultivated lands of the plaintiff from the defendant, it was a partition fence; that if it was a partition fence, either plaintiff or defendant might lawfully repair it, if it needed repair; and that if such partition gate or fencing was out of repair, and insecure for the protection of the defendant's plantation, and if it was necessary for the repair to remove the gate, and to connect the panels of the fence by rails, and the defendant did remove the gate for that purpose, and connect the panels of the fence by rails, he was not guilty of a trespass.

"The plaintiff excepted to this charge, and asked the court to instruct the jury, that if the gate was erected by the plaintiff on his own land, and the defendant entered upon the plaintiff's said land, without the plaintiff's consent, and took down the gate,—then defendant was guilty of a trespass; and that, although the gate and fence might be a partition fence, and needed repair, yet, if it was not necessary in effecting the repair to remove the gate, or if defendant did not remove it for that purpose, he would be guilty of a trespass. This charge the court gave, but further charged the jury, that if the gate and fence formed a partition fence, and was so used and recognized by both plaintiff and defendant, and was out of repair, and it was necessary in its repair to take down and remove the gate, and defendant took it down and removed it for that purpose, and repaired the fence,—he was not guilty of a trespass, although the gate was on plaintiff's land; and to this charge also the plaintiff excepted."

The charges of the court are now assigned as error.

JAMES E. BELSER, for the appellant.

JAMES L. PUGH, *contra*.

GOLDTHWAITE, C. J.—There can be no doubt, that, if a fence is a partition fence between two different owners, it confers the right on either to make the necessary repairs, and, as an incident to that right, gives authority to each to

enter on the land of the other for that purpose. This was decided in *Walker v. Watrous*, 8 Ala. 493; and to that extent we recognize that case as authority.

So, also, if a part of the fence was entirely on the land of one of the proprietors, still, if it was recognized as a partition fence by both parties, it would confer the same rights as if it were in fact so. The recognition would operate as an estoppel *in pais*; and neither could complain of any act done by the other, which would have been lawful, had the fence been on the division line.

But the right to repair would not authorize one to destroy. Neither, in our opinion, would the right to repair a fence authorize the erection of an entirely different structure; and the statute (Clay's Digest, 241, § 4) would not authorize any entry on the lands of another, which was inconsistent with the rights that statute gives. In other words, if a gate was not only used as such, but recognized also as part of a division fence, the right to repair it in the one capacity, would not authorize its destruction in the other. Although either party could repair it as a fence, neither could destroy it as a gate; and if the entry was made for the latter purpose, the statute would afford no protection.

The charge of the court was directly in conflict with the principles we have expressed, as it instructed the jury, in effect, that the defendant below might destroy the structure as a gate, in order to repair it as a fence.

Judgment reversed, and cause remanded.

RICE, J., having been of counsel for the appellant, did not sit in this case.

PRATT & MCKENZIE vs. KEILS & SYLVESTER.

[PETITION FOR RE-HEARING, AFTER FINAL JUDGMENT, ON GROUND OF ACCIDENT OR MISTAKE.]

1. *Validity of defence to original action, not necessary to be proved on trial of petition for re-hearing.*—A petition for a re-hearing (Code, §§ 2407-2417) after final judgment in an action at law, on the ground of "surprise, accident, mistake, or fraud," by which the defendant was deprived of the benefit of his defence to the original action, is a new action, on the trial of which it is only necessary for the defendant to prove the truth of the facts which constitute the alleged surprise, accident, mistake, or fraud: where the pleas filed to the original action are legally sufficient, he is not required to prove that they are true, or that the defence set up in them ought to prevail.
2. *Judgment on petition.*—If the trial of the petition results adversely to the petitioner, he cannot have a re-hearing of the original cause; but if the trial results in his favor, the proper judgment is, that the judgment rendered in the original action be vacated, that the execution issued under it be quashed, that a re-hearing be granted in the original action, that the petitioner be let in to make his defence in that action, and that he recover of the plaintiff in that judgment the costs which have accrued on the petition for re-hearing.
3. *Judgment corrected and affirmed at costs of appellant.*—Where the record shows that, after the expiration of the term at which final judgment was rendered, a petition for re-hearing under the statute was filed; that a motion was also made, at the ensuing term, to set aside and correct the entry of judgment; that exceptions were reserved to the rulings of the court on the hearing of the motion; and that the court rendered, as on the motion, such a judgment in substance as the petitioner was entitled to on his petition, from which judgment the opposite party appealed,—the judgment will be corrected, on error, at the costs of the appellant, and made to conform to the proper judgment on the petition.

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. JOHN GILL SHORTER.

The record in this case shows the following facts: Pratt & McKenzie commenced suit against Keils & Sylvester, on certain bills of exchange, in April, 1855. At the May term, 1855, to which the summons was returnable, the defendants, by attorney, filed six special pleas; and at the same term a judgment *nil dicit* was rendered for the plaintiffs. After the expiration of the term, and on the 31st May, the defendants filed a petition, which was sworn to and addressed to the

presiding judge of the circuit, and which alleged that they had a valid legal defence to the action,—that they employed counsel to represent them, who entered an appearance for them before the call of the docket; that the court, on the call of the docket, required them to state their defence, which they then did, and the case was thereupon passed; that their defence was regularly drawn out in pleas, which were filed with the clerk of the court before the case was again called, and by him endorsed “filed”; that the case was afterwards again called up, when the plaintiffs’ attorneys objected to the pleas; and demanded judgment, which the court refused; that they are advised and believe that no other action was had or taken in said case by the court, but by mistake an entry of judgment was made on the judge’s docket, and the clerk afterwards entered on the minutes of the court a judgment against the petitioners; that petitioners have a valid defence in said cause, and can establish it if the cause should be again tried; that neither they nor their attorneys knew, until several days after the adjournment of the court, that any judgment had been rendered in said cause; and that an execution has been issued on the said judgment. The prayer of the petition is, that the execution may be superseded and quashed, that the judgment entry may be set aside and corrected, and that a re-hearing of the original cause may be granted.

On the filing of this petition, a *supersedeas* of the execution was awarded. At the ensuing term, a motion was made, on notice to the plaintiffs in the judgment, “to correct the final entry of judgment at the last term, so as to make it speak the truth, in this: that no judgment was rendered, and the case should have been continued, instead of the entry made; also, to set aside the entry made, and to make the correct entry according to the facts; also, to set aside the entry of judgment, because it was not rendered by the court, but was made by mistake; also, to set aside the entry, because the court never rendered any judgment.”

The minute entry recites that “The said motion was accordingly granted, and upon the granting of said motion the following judgment was rendered: Came the parties, by their attorneys, and the plaintiffs in this motion move to correct the entry made against them at the last term, upon the

ground that no judgment was in fact rendered by the court, and that the entry was made by mistake, when the cause was continued, and should have been so entered; and the court being satisfied by sufficient proof, by affidavits, that no judgment was rendered in said case at said term, but that said case was continued by the court, it is therefore considered by the court, that the entry of judgment be set aside, and an entry made, as of that term, continuing said case, and that the execution which issued on said judgment be quashed, and that the plaintiffs in this motion recover the costs of the issuance and *supersedeas* of said execution."

On the trial of the motion, as the bill of exceptions states, the plaintiffs in the motion offered to read the deposition of Hon. Nat. Cook, the presiding judge at the last previous term of the court, who testified, that the counsel for the plaintiffs in the judgment, on the last call of the docket, insisted on a trial of the case; but he informed them that, in view of all the circumstances of the case, he would not force the defendants to a trial; that the case was not again called up; that he could not say what the court did in said case, but it was his intention to have continued it, and he supposed it had been continued. The defendants in the motion objected to each part of this deposition, "on the ground that it was not competent to impeach the judgments of the circuit court by parol"; but the court overruled their objection, and they excepted. It was further proved, in support of the motion, by one of the attorneys for the plaintiffs in said motion, that no judgment was rendered in said cause while he was present; that when he was about leaving the court, a short time before its final adjournment, he inquired of one of the opposing attorneys whether any further effort would be made to obtain a judgment at that term, and was informed by him, in reply, that no further effort would be made; and it was admitted that no further efforts were made by that attorney. An objection was made to the admission of each part of this evidence, "because it contradicted the record by parol"; but the objection was overruled, and an exception reserved. On behalf of the plaintiffs in the judgment, it was shown that there was an entry on the trial docket of the last term of said court, in the handwriting of the presiding judge, oppo-

site the case of Pratt & McKenzie v. Keils & Sylvester, in the words "Judgt. and enq.", the last two words being erased; that these words were written in the proper place for noting the fact of judgment, and that the entry was made in the same manner as in other cases where judgment was rendered by default; that the judgment was entered by the clerk on the minutes of the court in the usual form, and the minutes were signed by Judge Cook; and that the docket showed an appearance by counsel for the defendants. Upon this evidence, which was all the evidence offered on the trial, the court granted the motion, and the plaintiffs in the judgment excepted.

The errors assigned are, 1st, "the ruling and action of the court stated in the bill of exceptions"; 2d, "the judgment entry on the motion"; and, 3d, "the matters contained in the record."

E. C. BULLOCK, for the appellants, made these points :

1. The court had no power to set aside its judgment at a term subsequent to that at which it was rendered.—Holloway v. Washington, 3 Ala. 668; Mayor of Little Rock v. Bullock, 1 English, 282; Wood v. Luse & Niles, 4 McLean, 254; Taylor v. Starr, 2 Root, 298; Morgan v. Hays, Breese, 88; Sagory v. Bayless, 13 Sm. & Mar. 153; State v. Smith, 1 Nott & McCord, 16; State v. Fields, Peck, 140; Ashley v. Hyde & Goodrich, 1 English, 92; Commonwealth v. Ca-wood, 2 Virginia Cases, 527; Hailey v. Baird, 1 H. & M. 25; Byrd v. McDaniel, 26 Ala. 585.
2. The judgment setting aside the final judgment of the previous term, and continuing the cause as of that term, was a judgment *nunc pro tunc*, which can only be rendered on some matter of record or memorandum of the court. The action of the court, being predicated entirely on parol evidence, was clearly erroneous, the record being perfectly regular.—Draughan v. Tombeckbee Bank, 1 Stew. 66; Andrews v. Branch Bank at Mobile, 10 Ala. 375; Thompson v. Miller, 25 *ib.* 470; Dickens v. Bush, 23 *ib.* 849.
3. In answer to the position that this was not a motion, but a proceeding under section 2408 of the Code to obtain a re-hearing of the cause, it is to be observed, in the first place,

that the provisions of the Code, giving a summary remedy by petition to a party who was prevented by surprise, accident, mistake or fraud from making his defence, make no change in the rules of evidence by which that fact is to be established. A party, for instance, may show that, by fraud on the part of his adversary, or by the mistake or accidental illness of himself or his counsel, he was prevented from making a valid defence; but this must be shown by competent proof. It is not necessary, in giving effect to this provision of the Code, to overthrow the salutary and long-established rule of evidence, which forbids a record to be contradicted by parol.—3 Bla. Com. 22; 1 Coke's Inst. 260; 2 Ph. Ev. 2. It would be difficult to conceive a more flagrant or monstrous departure from a principle so venerable, than allowing a record, solemnly signed by the judge in open court, to be set aside on his mere statement, in his private capacity, that he did not know whether he gave judgment or not, but that his intention was to continue the case.

Again, the foundation of the statutory remedy is, that the party has been prevented from making his defence. If he had no valid defence, it matters not how much he may have been surprised, mistaken, or defrauded, since it is *damnum absque injuria*. If the petition failed to allege that the party had a valid defence, it would be fatally defective, and he could not obtain a *supersedeas*. The statute requires the court to try the facts alleged in the petition, or to re-hear the cause at the first term. The evidence, therefore, should have established at least two facts—to-wit, a valid defence and the cause which prevented the party from making it; for in no other way can there be a trial of the facts stated in the petition, or a re-hearing of the cause. The spirit and intention of the statute is to extend the period within which a new trial can be obtained, or to provide a substitute for a bill in chancery; and, viewed in either light, the party ought to show that he has a valid and meritorious defence.

The States of Texas, Vermont and New Hampshire have statutes similar to this provision of our law; and, while the courts of New Hampshire have decided that the validity of the defence is not inquired into on the hearing of the petition, the construction here contended for has been adopted in

Texas and Vermont.—Spencer v. Kinnard, 12 Texas, 186; Durkee v. Marshall, 14 Vermont, 559; Beckwith v. Middlesex, 20 *ib.* 594. In this case, the record sets out all the evidence, and shows that there was no proof of the validity of the defence.

L. L. CATO and P. T. SAYRE, *contra*:

The action of the court, under the facts shown in the record, may be sustained either as a motion to correct the judgment entry, or as an application for a re-hearing under the Code.

1. All courts possess the power to correct their own entries, upon sufficient proof, even after the expiration of the term, so as to make them speak the truth; or to set aside a final judgment rendered at a previous term, on affidavit that it was rendered by fraud or mistake.—Coffey v. Wilson & Gunter, 2 Ala. 703; Delancey v. Brownwell, 4 Johnson, 137-40; Bayly v. Boorne, Stra. 392; 1 Burr. 571; Wooster v. Woodhull, 1 Johns. Ch. 541; Dunham v. Roberts, at the present term. All these cases proceed on the idea that the mind of the court must enter into and give its sanction to the judgment.

2. Considered as an application for re-hearing, the petition was filed in time, and alleged all the necessary facts; while the judgment of the court, though not strictly formal, is, in substance and effect, a judgment for a re-hearing of the original cause, which will be here corrected and affirmed.—Stiles & Co. v. Lightfoot, 26 Ala. 443; Evans v. Gordon, 8 Porter, 146. The deposition, too, may be looked to, to connect the judgment with the petition, for the motion was not pending when the interrogatories were filed. The sound construction of the statute, providing for such applications for re-hearing, requires that the petition shall be first tried, and, if allowed, then the original cause shall be re-tried. Section 2412 provides for the trial of the facts alleged in the petition, or for a re-hearing of the cause. If the facts stated in the petition are tried, the court may (under section 2417) direct the issue to be made up, and refer it to a jury; while, if the original cause is tried, or re-heard, it must be tried by a jury, as a matter of course, like all other cases involving questions of

fact. Therefore, unless section 2412 provides for two different trials, either of which may be adopted, section 2417 is useless and unmeaning. The only way in which effect can be given to all the provisions of the statute, is to require the application for re-hearing to be first tried, and, if the petition is granted, then the original cause to be re-heard.

RICE, C. J.—It may be conceded that, before the adoption of the Code, any court of record had the power, in certain cases, to *vacate* at a subsequent term a final judgment rendered by it at a previous term; and that this power has not been diminished by the Code.—*Ex parte* Sanford, 5 Ala. 562; *Ex parte* Weissinger, 7 *ib.* 710; Hood v. Br. Bk. Mobile, 9 *ib.* 335; *Ex parte* Orenshaw, 15 Peters' Rep. 119; Reid v. Kelly, 1 Dev. Rep. 313; Austin v. Rodman, 1 Hawks, 71; Tisdale v. Gandy, 1 Hawks, 282. But it is certain that, before the Code became operative, a circuit court had no power to grant a *new trial*, or *re-hearing*, after the term had closed at which final judgment had been rendered by it, unless, during that term, a motion for a new trial or re-hearing had been made and continued.—Walker v. Hale, 16 Ala. 26; Fitzpatrick v. Hill, 9 *ib.* 783; Van Dyke v. The State, 22 *ib.* 57. In this respect, the Code has enlarged the power of the circuit court, and has authorized it to grant re-hearings in certain cases, on applications made after the term has closed at which final judgment was rendered.—Code, §§ 2407–2417. One class of those cases is, where a party has been prevented from making his defence by surprise, accident, mistake, or fraud, without fault on his part, and within four months from the rendition of the judgment applies for a re-hearing, by petition to a judge of the circuit court, stating the matter complained of, with a prayer for the appropriate relief, and swears to the facts stated in the petition, or verifies them by a transcript of the record submitted with the petition.

In the case at bar, the application for re-hearing was made within the time, and substantially in the mode, prescribed by the Code. The judge to whom the petition was addressed, made the necessary order for a *supersedeas*, to restrain the enforcement of the execution; and at the term of the circuit court next thereafter, on motion made and proof submitted,

the final judgment rendered against the petitioners at the previous term was set aside, and an entry made, as of that term, continuing said case; and the execution was quashed, and the plaintiffs in the judgment were taxed with the costs of the issuing and *supersedeas* of the execution. From this judgment they appeal to this court.

The petition must be regarded as a new action, the object of which was to obtain a re-hearing and trial on the merits, in the original action, and to vacate the judgment which had been rendered in it; because, until that judgment was vacated, it stood in the way of such re-hearing and trial on the merits. *Shearer v. Boyd*, 10 Ala. 279.

The petition was sworn to, and stated that the petitioners had a valid legal defence to the original action,—that they had employed counsel to represent them; that an appearance was entered for them in said action, by said counsel, before the calling of the docket of said circuit court; that their defence was regularly drawn out in pleas, which were filed, and endorsed by the clerk as filed; that, after the filing of their pleas, the case was called, and the pleas submitted to the court, and objected to by the plaintiffs' attorneys, who thereupon demanded a judgment for the plaintiffs, which the court refused; that afterwards the judgment was entered by mistake, &c. The facts stated in the petition clearly show the mistake, and that the entry of the judgment was without any fault of the petitioners, and that it did and will deprive them of making their defence, if it is not vacated. The evidence submitted on the trial of the motion made by the petitioners, proves all the matters and facts stated in the petition, except *the validity* of their defence. And the question thereupon arises, Was it essential, to entitle them to a re-hearing in the original action, that they should, on the application for it, prove that their pleas on file were *actually true*, and that they ought to *prevail* as a defence.

Our opinion is, that it was not the design of the legislature, in adopting the sections of the Code above referred to, to compel defendants, who had filed pleas legally sufficient, but who had been deprived of the opportunity of establishing their truth in the original action, by mistake, without fault on their part, to prove the truth of those pleas in two distinct

suits with the same plaintiffs. It could not have been designed to require defendants, in such cases as the present, (where they were deprived of all opportunity to make their defence,) to prove the truth of their pleas, in order to obtain a re-hearing in the original suit, and then, after obtaining a re-hearing, to prove again the truth of the same pleas on the trial of the original suit. In such cases, the truth of the pleas filed to the original action is not a matter to be tried under the petition for re-hearing; but the trial under the petition must be confined to "the matter complained of" by the petitioners—that is, to the facts alleged in the petition, which, in legal contemplation, constitute the "surprise, mistake, accident, or fraud," which, without fault on the part of the petitioners, prevented them from making their defence. The petition is not the re-hearing, but the mere application for it. Whenever it appears from the petition and proof, that pleas, legally sufficient, have been filed to the original action; that facts exist which, in legal contemplation, constitute "surprise, accident, mistake, or fraud;" and that by such surprise, accident, mistake or fraud the petitioners were prevented from making their defence, or deprived of the opportunity of proving the truth of their pleas, without fault on their part, the petitioners are entitled to a re-hearing of the original action, and to be let in to make their defence or prove the truth of their pleas.—N. E. Mutual Ins. Co. v. Lisbon Man. Co., 2 Foster's Rep. 170; Edmonson v. Popkin, 1 Bos. & Pul. 270; Hindle v. O'Brien, 1 Taunton, 413.

The plaintiffs in the judgment can always dispense with a trial of the facts alleged in the petition, by consenting that there may be a re-hearing and trial of the original cause at the first term after the granting of the order for a *supersedeas*. If, however, they insist on trying the facts alleged in the petition, they cannot, *in such a case as the present*, require of the petitioners, on the trial under the petition, to prove either that the pleas filed in the original action are true in fact, or that the defence set forth in those pleas *ought to prevail*.

Where a trial of the facts stated in the petition is had, and finally results adversely to the petitioners, they cannot have a re-hearing of the original cause. But, where such trial results in favor of the petitioners, the proper judgment is, that

the judgment rendered in the original action be vacated; that the execution issued under it be quashed; that a re-hearing be granted in the original action; that the petitioners be let in to make their defence in that action; and that they recover of the plaintiffs in that judgment the costs which have accrued under the petition for the re-hearing. To such a judgment, the petitioners in the present case are entitled under their petition and proof. They have obtained it in substance, but not in form. It must here be corrected, and made to conform to what we have indicated it should have been; and being thus corrected, it must be affirmed, at the costs of the appellants.

The motion made by the petitioners, at the term next after they obtained the order for a *supersedeas*, to correct the judgment entry, or to set it aside, was unnecessary. The petition itself was a sufficient motion to set aside or vacate the judgment, and for a re-hearing. It seems so to have been understood by both parties, for the depositions taken under the petition, before the motion was made in court, were used without any objection founded on the fact that they were taken before the motion was made. It is clear from the record, that no injury resulted to the appellants from the making of that motion, and that the action of the court may be referred to and sustained under the petition; and, therefore, it is right to correct and affirm the judgment,—distinctly making it a judgment founded on the petition.

THOMPSON'S ADM'R vs. CHRISTIAN ET AL.

[BILL IN EQUITY BY VENDER TO RESCIND CONTRACT AND ENJOIN JUDGMENT ON NOTES GIVEN FOR PURCHASE MONEY.]

1. *Vendee's right to rescind contract and enjoin judgment for purchase money.*—The purchaser of land, so long as the contract remains executory, has a right to demand a good title; but, after accepting a conveyance, the maxim *caveat emptor* applies with the utmost rigor, and he cannot, in the absence of fraud or mistake, rescind the contract in equity, and enjoin a judgment for the purchase money, as on an executory contract.

2. *Facts showing acceptance of conveyance.*—Where the vendee filed his bill to rescind the contract, and to enjoin a judgment for the purchase money, as on an executory contract, it was held that the pleadings and proof showed that he had accepted a conveyance, because, 1st, it was unreasonable to suppose that, after exhibiting the caution shown by other facts connected with the purchase, he would have rested for so long a period (three years) after discovering his vendor's want of title, without any written evidence of his purchase, when the agreement was that a conveyance "was to be executed in a very short time"; 2d, the bill did not allege, positively and explicitly, that he never accepted a deed, but only averred that the vendor "never complied with his promise in relation to the title to said land", and that complainant "has no deed to said land"; 3d, he executed a mortgage on the land, of even date with the notes given for the purchase money, to secure the payment of the notes, and recited therein that a deed had been executed to him; and, 4th, the register reported, on a reference, that he had constructive possession of the land by reason of the conveyance to him.

APPEAL from the Chancery Court of Sumter.

Heard before the Hon. WADE KEYES.

This bill was filed by James H. Thompson, the appellant's intestate, on the 20th November, 1845, and alleged the following facts: That on the 29th February, 1840, A. H. Christian and J. H. Carr (the former professing to act as trustee, and the other as the authorized agent of W. H. Carr, who was the other trustee, under a deed of trust which they pretended had been executed to said trustees by Pollard & Carr, a mercantile firm in the town of Gainesville) exposed certain real estate to public sale, and represented that the sale would convey a good title to the purchaser; that complainant had previously understood that said Pollard & Carr had made an assignment of their effects, and supposed that said assignment was fairly and honestly made to secure their creditors, but he had never seen the deed, and knew nothing of the facts and circumstances attending its execution; that, confiding in the representations of said Carr and Christian, and believing that he would get a good title, complainant became the purchaser of the land, at the sum of \$1680; that when said J. H. Carr, a few days after the sale, called on him to execute his notes for the purchase money, complainant, having made some inquiries, was not satisfied that he would get a good title, and therefore refused to execute his notes; that said Carr thereupon assured him that he had

bought a good title, and promised that, if he would execute his notes for the purchase money, a good title should be conveyed to him, with a warranty of title from the trustees, and a relinquishment of dower by said Pollard's wife; that under these promises and representations he executed his notes for the purchase money, payable to said trustees, according to the terms of the sale, with one R. G. McMahan as surety; that said trustees afterwards brought suit on these notes, against complainant and his surety, and obtained judgments thereon in November, 1843; that complainant employed counsel to defend said suit, and was advised by them that he could not defend at law, but could only make his defence available in equity; that the attorneys of the trustees concurred in this opinion, and agreed that, if he would let judgments go against him at law, "he should have all the same advantages, and stand in all respects as to relief, as if he had interposed by bill in equity, and had obtained a hearing before judgment at law"; and that he let judgment by default go against him under this arrangement.

The bill further alleged, that complainant ascertained for the first time, in the spring of 1843, that said pretended deed of trust was executed on behalf of said Pollard under and by virtue of a power of attorney to one Arthur Slaughter, which in fact gave him no authority whatever for that purpose; that the firm of Pollard & Carr, at the time said deed was executed, had been dissolved, and said Pollard was then a lunatic; that said Pollard and Carr have both since died insolvent, and no administration has been granted on their estates, except that one Nash was appointed administrator of said Pollard for the purpose of defending a bill in chancery; that said A. H. Christian and W. H. Carr, the trustees in said pretended deed of trust, "are entirely insolvent, that no such titles as were promised to complainant can be had by them, and that their warranty, by reason of their insolvency, would be utterly valueless"; that complainant "has never had actual possession of said lot, nor has he had constructive possession thereof, at any time since he learned the state and difficulty of the title, but has abandoned all right to the same"; that in May, 1843, James Hair, as administrator of Samuel L. Jones, and Sperring & Laforgue, having

obtained several judgments against said Pollard & Carr, filed bills in chancery to set aside said pretended deed as fraudulent and void, and obtained a decree at the June term, 1845, declaring said deed fraudulent and void in fact and in law, and ordering an account of the property conveyed by it; that said Sperring & Laforgue, in March, 1842, caused said land to be sold under their judgment, "and thereby the title of said Pollard has passed to the purchasers at said sale, whereby it is placed entirely beyond the power of said trustees to convey to complainant a good title"; that "neither said Christian nor Carr ever complied with the promise made by said Carr, in regard to the title to said land, when said notes were executed, and he (complainant) has no deed for said land, or any instrument whatever in writing for the same"; that his bill was not sooner exhibited, because the plaintiffs in said judgments had not attempted to enforce them, and because he was awaiting the result of said litigation in chancery, in order that he might be fully advised as to the construction of said deed of trust and power of attorney and the parties in interest.

W. H. Carr, A. H. Christian, Sperring & Laforgue, James Hair, as administrator of Samuel L. Jones, and Arthur Slaughter, are made defendants to the bill; and the prayer is, that the sale to complainant may be set aside and rescinded, that the judgments at law may be enjoined, and for general relief.

Decrees *pro confesso* were entered against Slaughter and W. H. Carr, and the other defendants answered. Christian, in his answer, admits the sale to complainant, the insolvency of Pollard & Carr, his own insolvency, and the proceedings in the chancery suits; denies that he made any representations to the complainant about the title; and alleges that he does not know whether Carr made any such representations or not. Sperring & Laforgue answered on information and belief, denying the equity of the bill. Hair admits that complainant, when he purchased, supposed that the deed of trust had been fairly and honestly made; believes that the firm of Pollard & Carr was dissolved when the deed was made; admits the insolvency of Christian, and the insolvency and death of said Pollard and Carr; believes that complainant

had actual and constructive possession of the land, and a conveyance from the trustees; admits the proceedings in the chancery suits, and the sale under execution; and alleges that the legal title was not in Pollard & Carr, but was conveyed to the trustees by one Lewis on the 8th March, 1840.

A supplemental bill was afterwards filed, alleging that, in March, 1850, the land was sold under execution against said Christian and Carr, as trustees; and this fact was admitted.

The deposition of said Christian was taken by some of his co-defendants, under an order of court, subject to exception on the ground of incompetency from interest. The complainant moved to suppress his deposition, on the ground that he was a party to the suit, was liable for costs, and was interested; and it was agreed that this motion should be decided at the hearing on the merits.

On final hearing, on pleadings and proof, the chancellor dismissed the bill; and his decree is now assigned as error.

TURNER REAVIS, for appellant, made these points:

1. The bill contains abundant equity. The complainant states his claim to equitable relief, 1st, on the ground that the trustees represented that the sale would convey a good title; when it did not and could not; 2d, on the ground that, although he had given his note for the purchase money, he had no deed or other written evidence of title; 3d, on the ground that Sperring & Laforgue had had the property sold under execution, so that the trustees never could make him a title; 4th, on the ground that the deed of trust, under which the sale was made, had been set aside and declared void; 5th, on the ground that complainant, when he purchased, supposed that the assignment was *bona fide* and duly executed, when in fact it was not, and consequently he was mistaken; and, 6th, that he had been promised a good title as an inducement to execute the notes, and the promise had never been complied with. On any one of these grounds he was entitled to relief, whether he could have defended at law or not. If, however, on the case made by the bill, he could have defended at law, he was prevented from doing so by the representations and agreement of the plaintiffs' attorneys in the law court.

2. The trustees agreed to sell the title of Pollard & Carr,

but it has not been in their power to comply with their agreement at any time since it was made. The power of attorney from Pollard to Slaughter did not authorize him to join Carr in assigning the property of the firm, and Carr could only convey his own interest in the real estate of the firm.—Lang v. Waring, 17 Ala. 145; Anderson v. Tompkins, 1 Marsh. Dec. 456. If, therefore, Pollard & Carr had a title, and if the trustees made a deed to complainant, he only got half of what they contracted to sell him; and this brings the case within the rule, that a party may rescind the contract when he cannot get the title for which he contracted.—Sugden on Vendors, vol. 1, pp. 345-69; Meador v. Sorsby, 2 Ala. 712; Puckett v. McDonald, 6 How. (Miss.) 269. The maxim *caveat emptor* does not apply, where a particular title is sold, or where the conveyance under which the sale is made is fraudulent as to creditors.

3. The deed of assignment, under which the trustees sold the land, is fraudulent on its face.—Grimshaw v. Walker, 12 Ala. 101; Reavis v. Garner, *ib.* 661. The complainant was affected with constructive notice of this when he purchased, and therefore cannot, in any event, be protected as a *bona fide* purchaser.—Johnson v. Thweatt, 18 Ala. 742. Besides, the deed has been judicially declared null and void, on the ground that it is fraudulent as to the creditors of Pollard & Carr; and it would be unjust, as the court say in Meador v. Sorsby, *supra*, to compel him to receive a title which the creditors of Pollard & Carr may successfully dispute.

4. The complainant purchased, and the trustees sold, under the honest impression that the deed of trust was valid. This was either a mistake of fact, or a mistake of law; and on either ground complainant is entitled to relief.—Kennedy v. Kennedy, 2 Ala. 572; Lawrence v. Beaubien, 2 Bailey, 623.

5. The deed of assignment being fraudulent on its face, the judgment against Pollard & Carr under which the land was sold, and which existed at the time Thompson purchased, was a lien upon the land, if Pollard & Carr had the legal title; and the land having been subsequently sold under that judgment, and the money applied towards its payment, it is not in the power of the trustees, nor of any one substituted to their rights, to make Thompson a title.—Johnson v. Thweatt,

supra. It is immaterial whether Thompson has been in actual possession or not; for, if he has been, he is liable to account for the use and occupation to the purchasers at the execution sale, from the date of their deed, and to the creditors of Pollard & Carr for the residue.—Smith v. Houston, 16 Ala. 111; Johnson v. Thweatt, *supra*.

6. In point of fact, as shown by the evidence, the legal title was in Pollard & Carr.

7. The bill alleges that complainant never had a deed. The decree *pro confesso* against W. H. Carr is an admission of the allegation so far as he is concerned. The answer of Christian, the other trustee, who was one of the parties to have executed the deed, does not deny the allegation of the bill; and being a fact which must be presumed to have been within his knowledge, his failure to answer the allegation is an admission of the fact.—Kirkman v. Vanlier, 7 Ala. 217. This admission of Christian is evidence against Hair and Sperring & Laforgue, who claim through him.—Julian v. Reynolds, 8 Ala. 683; 6 How. (Miss.) 487; Field v. Holland, 6 Cranch, 8; Osborn v. U. S. Bank, 9 Wheaton; 738. *It is a fact, too, which cannot be contradicted*.—4 Barb. S. C. R. 265. The deposition of Christian, so far as it goes to show that he made a deed to Thompson, will therefore be disregarded. Besides, his deposition ought to be disregarded entirely, because he is a party to the record, is liable for costs, and is interested to the extent of his right to compensation for selling the property, and instituting suits for the purchase money. Allison v. Allison, 7 Dana, 90. The recital in the deed of trust from Thompson to Christian and Carr, to secure the payment of the notes for the purchase money, which is relied on as an estoppel, cannot have that effect, 1st, because of the admission to the contrary in Christian's answer, and the decree *pro confesso* against the other trustee; and, 2dly, because estoppels only operate between parties and privies.—2 Thomas's Coke, top p. 342. Such a recital would be no estoppel, even between the parties.—2 Johns. Ch. 210.

JAMES HAIR, *contra*, contended (*inter alia*) that, construing the bill most strongly against the complainant, the plain inference from its allegations was, that he had accepted a deed

from the trustees, and had constructive possession of the land; that this inference was supported by the facts shown in the record; and that, on this state of facts, he could have no relief in equity.

CHILTON, C. J.—In *Cullum v. The Branch of the Bank of the State of Alabama at Mobile*, 4 Ala. 21, it was decided, that the law confers upon the purchaser of land the right to demand a good title, so long as the contract remains executory; but, when fully consummated by the execution of a conveyance by all the necessary parties, then the rule of *caveat emptor* applies with its utmost rigor. So that, in such case, if the purchaser is afterwards evicted by a title to which the covenants in his deed do not extend, he is without relief either at law or in equity. In the absence of fraud or mistake, this rule is a good one, as it requires nothing more than every sane man should observe, and is culpably negligent if he does not, in obtaining title to his land.

In the case before us, we think it sufficiently appears by the record that a deed was executed by the trustees to the intestate of the appellant in his lifetime. We arrive at this conclusion from the following considerations:

1. It is alleged by the bill that Thompson, after he made the purchase, was unwilling to complete it, because he was not, upon inquiry, satisfied with the title he would get; that thereupon John H. Carr informed him, that a good title had been sold him, and promised and assured him that, if he would execute the notes for the purchase money, good titles should be conveyed to him,—that the trustees in said deed would fully warrant the title to him, and that the wife of said Pollard should execute a release of her dower,—which conveyance, it is averred, “was to be executed in a *very short time*”; and thereupon the notes, with security, dated the 29th February, 1840, were executed by Thompson. Having exhibited this much caution and solicitude with regard to the title, and having executed his notes upon the assurance that a deed with warranty, and a relinquishment of dower on the part of Pollard's wife, should be executed in a *very short time thereafter* by the trustees, Christian & Carr, it is quite unreasonable to suppose the vendee would have contented him-

self, without *any evidence whatever* in writing of his purchase, for more than three years, when, according to the bill, he discovered the trustees' want of title. This he found out in the spring of 1843.

2. In the next place, the bill avoids any direct allegation, as to whether the promised conveyance was executed. At least, its allegations may be literally true, and yet a deed may have been executed as agreed upon, and afterwards lost or destroyed, or put out of the complainant's possession. It is averred that no such titles as were promised by the trustees can be had by them,—that their warranty would be utterly valueless by reason of their insolvency; that complainant never had the actual possession of said lot, "nor has he had the *constructive possession* thereof, at any time *since he learned the state and difficulty of the title*, but has abandoned all right to the same"; that "neither said Christian nor Carr ever complied with the promise made by said Carr, in relation to the title to said land, when said notes were executed as aforesaid; and that he *has no deed* for said land, nor any instrument in writing whatever for the same." It is not averred that the trustees failed to execute a deed with warranty of title, but that they failed to comply with their promise,—it may be in failing, in the opinion of complainant, to convey a *good title* as promised, or in procuring a relinquishment of dower on the part of Mrs. Pollard, or in failing to do this in a "very short time." In either event, the bill might be literally true, and yet a deed have been executed; and, although the complainant may not have had such deed in his possession when he filed his bill, and was enabled to say, in the present tense, "he *has no deed* for said land," &c., it does not follow that he did not, at some previous time, have a deed for the same. This criticism might appear too rigid, but for the fact that it is strongly fortified by other facts developed by the record; as,—

3. It appears that Thompson executed a mortgage, with power of sale, of even date with the notes, to one D. M. Russell, on the same lot, to secure the payment of the notes given for the purchase-money, in which mortgage he recited that a deed was executed to him for the lot thus purchased; and,—

4. Christian, one of the trustees, is examined as a witness,

and testifies that he thinks a deed was made to Thompson; and,—

5. In the last place, the register reports that Thompson was in the *constructive possession*, by reason of the conveyance of the title to him; and to this report no exception was taken.

In view of all these considerations, we do not think the facts relied upon by the appellant sufficient to repel the conclusion that a deed was executed by the trustees to Thompson.

An effort was made to exclude Christian's deposition, on the ground that he was interested. The objection may be conceded to be valid, yet it does not affect the result, as the record amply sustains the conclusion at which we have arrived without this proof.

Having arrived at the conclusion that a deed was executed by the trustees to the complainant, Thompson, he could not file his bill as upon an executory contract, wholly disregarding the deed. Whether he has any remedy, except upon the covenants contained in his deed, is not a question which we need now decide.

Let the decree of the chancellor, dismissing the bill, be affirmed.

GLIDDON vs. MCKINSTRY.

[ACTION AGAINST ACCEPTOR OF WRITTEN ORDER FOR NEGLIGENCE IN COLLECTING AND FAILURE TO PAY WHEN COLLECTED.]

1. *Order payable out of particular fund, when collected, not bill of exchange.*—A written order, requesting the person to whom it is addressed to pay a specified sum out of the proceeds of a certain judgment, when collected, is not a bill of exchange.
2. *Consideration of acceptance of such order may be proved, and how.*—The acceptor of such an order, when sued for negligence in collecting and failure to pay when collected, may prove the consideration on which his acceptance was based; and for this purpose may show that the money collected on the judgment was paid to other persons who had prior claims on the fund, and that the balance was not collected.

3. *Abstract charge properly refused.*—A charge upon a question which is not shown, either by the pleadings or the bill of exceptions, to have been raised in the case, is abstract, and may be refused for that reason.

4. *Burthen of proving diligence or negligence.*—Where the payee of a written order, requesting the defendant to pay out of the proceeds of a certain judgment when collected, brings suit after acceptance, for the defendant's negligence in collecting and failure to pay when collected, the burthen of proving negligence is on the plaintiff, and not on the defendant to prove diligence.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

This action was brought by John S. Gliddon against Alexander McKinstry, and the complaint was as follows:

"The plaintiff claims of the defendant \$225, due on an order drawn by John A. Cuthbert, on the 27th day of June, 1846, as follows: 'Alex. McKinstry, Esq.—Please pay to John Gliddon \$225 out of the proceeds of the judgments from the county court of Mobile county, in your favor, against A. C. Hollinger and A. Hollinger, when collected; this sum to be credited on your acceptance of an order in my favor for money to be collected on said judgments;' which said order was accepted by said McKinstry, payable to John Gliddon; and though money sufficient to pay said order has been received from said judgments, it is still due and unpaid. And plaintiff further claims of defendant \$225, for that the said defendant did accept a certain order, drawn by John A. Cuthbert, on the 27th day of June, 1846, as follows:" (setting it out as above;) "which said order was signed by John A. Cuthbert, and accepted by said McKinstry, payable to John Gliddon; and plaintiff further avers that, by the exercise of due diligence, the said judgments, or a sufficient amount thereof to satisfy said order, might have been collected by defendant, but that he negligently, and of his own wrong, failed and refused to collect said judgments, and has never paid said order, or any part thereof. And plaintiff further claims of the defendant \$225, on an order, drawn by John A. Cuthbert, on the 27th day of June, 1846, as follows:" (setting it out as above;) "which said order was accepted by McKinstry, acting as trustee for John A. Cuthbert and others, and the interest of said Cuthbert being for a greater amount than is called for in said order; and though defendant has collect-

ed sufficient money out of said judgments to satisfy said order, it is still due and unpaid."

The defendant pleaded, in short by consent, "the general issue, with leave to give any special matter in evidence."

On the trial, as appears from the bill of exceptions, the plaintiff read in evidence the order described in his complaint, which was endorsed "accepted," and the defendant's name signed to the endorsement. "He further proved by a witness, that defendant admitted to him that he had collected \$450 out of said judgments, and that this admission was made about two years since; but the witness stated, on cross-examination, that defendant said, at the same time, that he had paid over all the money to other persons than the plaintiff, to whom it belonged; and witness said, that defendant named the persons to whom he had paid the money, but that he had forgotten who they were. To this answer the plaintiff objected, because it was illegal; which objection the court overruled, and the plaintiff excepted. Plaintiff here closed his case."

"The defendant then introduced in evidence a deed of trust, made by Thomas A. Carr, dated February 9th, 1844, transferring a note for \$692 42, dated April 1st, 1844, payable twelve months after date, made by Adam C. Hollinger, in favor of, and endorsed by Alex. Hollinger, then in the possession of C. A. Gilbert, upon which said judgments were founded; in which said deed it is specified that said Carr's interest in said note amounts to \$400, more or less; and said deed provides that said defendant should, out of the proceeds of said note when collected, pay a debt of \$130 due to S. Mordecai, and a debt of \$280 due to C. A. Gilbert. The plaintiff objected to the introduction of said deed, because the same was illegal testimony; which objection was overruled by the court, and plaintiff excepted."

The defendant then offered the deposition of said Cuthbert, who testified, that Thomas A. Carr, being indebted to him in about the sum of \$500, assigned to him his (Carr's) interest in the judgments which McKinstry had obtained against A. C. Hollinger and Alex. Hollinger; that this assignment, which has since been lost, gave him power to call on McKinstry for payment of the money collected on said judgment;

that McKinstry was not indebted to him at the time he gave said order to Gliddon, and that said order was founded entirely on the interest acquired by witness through the assignment of said Carr; that it was his understanding that a debt to C. A. Gilbert was to be first paid by McKinstry, but he did not so inform Gliddon at the time said order was given, the order having been sent to him by the hands of a third person. The plaintiff objected to the introduction of this deposition, "because the same was both illegal and irrelevant"; but the court overruled the objection, and the plaintiff excepted. The defendant then proved the payment of the debts to said Mordecai and Gilbert, under said deed of trust, and their receipts for the same. The plaintiff also objected to this evidence, as irrelevant and illegal; but the court overruled the objection, and the plaintiff excepted.

"This was all the evidence in the cause; and the plaintiff thereupon requested the court to charge the jury as follows: 1. That the question of consideration cannot arise between the parties to this case. 2. That the statute of limitations does not commence until the plaintiff knew that the defendant had collected the money. 3. That the defendant was bound to collect the money due upon said judgments, or to use due diligence in collecting it; and that it is for him (the defendant) to show due diligence. 4. That if the defendant did collect more than the plaintiff's claim, or did not use due diligence to collect, then the question of consideration does not arise. All these charges the court refused to give, and the plaintiff excepted to each refusal."

The rulings on the evidence, and the refusals to charge as asked, are now assigned as error:

E. S. DARGAN, for appellant.

R. H. SMITH, *contra*.

GOLDTHWAITE, C. J.—We are unable to perceive any error in the rulings of the primary court in this case. The instrument executed by Cuthbert, in favor of the appellant, requesting McKinstry to pay appellant two hundred and twenty-five dollars, "out of the proceeds of the judgments from the county court of Mobile county against A. C. & A.

Hollinger, when collected", and which was accepted by McKinstry, is not a bill of exchange. It is not payable absolutely, but the order is to pay out of certain proceeds *when collected*, and which might or might not be collected. It was for a part of the judgment previously transferred to Cuthbert.

It was competent, therefore, for McKinstry to show by proof the consideration upon which his acceptance was based, and that no funds, the proceeds of the judgments mentioned in the order, belonging to Cuthbert, the drawer thereof, ever came to his (McKinstry's) hands. As tending to show this, the court properly allowed him to introduce the trust deed from Carr, by which the claim on which the judgments were founded was transferred to McKinstry; also, the depositions of Cuthbert and Gilbert, no objection being taken to either of these witnesses on the score of interest. This evidence showed that the funds which had been collected upon the judgments were exhausted by payments to those having claims prior to that of appellant, and that the portion of the judgment assigned by Carr to Cuthbert, and by the latter to appellant, has not yet been collected.

As respects the charges: The first, which denied an inquiry into the consideration of the appellee's acceptance, was properly refused. The acceptance must be taken in connection with the request, which was conditional, and, when properly construed with reference to the subject-matter, amounted to a promise on the part of McKinstry to pay the amount of the order to Gliddon, when that sum should be collected by him, which would otherwise have been payable to Cuthbert.

For aught that appears, the second charge was purely abstract, as no question appears to have been raised by the pleadings, nor by the bill of exceptions, involving the statute of limitations. It does not appear that it was insisted on, and hence the court might well refuse to charge upon it.

The third charge assumes, that the *onus* of proving diligence was cast upon McKinstry, and that he could be held liable for neglect in failing to collect the judgments, in the absence of all proof showing, or tending to show, that he failed to do his duty respecting said demand. Such is not the law. The plaintiff avers negligence, and he must prove

it, or some fact from which the jury may properly infer it. Until he does this, the defendant may remain passive, as no case is made against him.

The fourth charge denies to McKinstry the right to discharge the prior liens upon the sum collected, assuming that, if he collected more than the appellant's claim, the question of the consideration of his acceptance could not arise. We have seen that this position cannot be sustained, (see *Smith v. Houston*, 8 Ala. R. 736); and although other portions of this charge might be proper, yet, being connected with this, which was bad, the court properly rejected the whole.

Judgment affirmed.

WALKER, J., not sitting.

OWENS vs. WHITE.

[ASSUMPSIT ON THE COMMON COUNTS FOR SERVICES RENDERED.]

1. *Admissibility of evidence of plaintiff's general good character.*—Where plaintiff and defendant are both examined as witnesses under the statute, in assumpsit on the common counts for services rendered, and contradict each other in some particulars, and the defendant then introduces a witness who testifies to conversations of the plaintiff which, in some particulars, contradict her testimony on the trial, the plaintiff cannot be allowed to prove her good character, by the declarations of the defendant, or in any other manner.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. NAT. COOK.

This action was brought by Louisa White against Richard B. Owens, "to recover \$200, due from defendant to plaintiff, for services rendered by plaintiff in the capacity of house-keeper, at the special instance and request of the defendant, during a part of the year 1852." The declaration contained all the common counts. The action was commenced in October, 1852, and the trial was had at the Spring term, 1855.

"On the trial," as the bill of exceptions states, "the plaintiff was examined as a witness, under notice to the defendant, and proved her claim against him. The defendant was also examined as a witness, and, in some particulars, contradicted the plaintiff. The defendant introduced the testimony of Calvin L. Casterline, which showed some conversations of the plaintiff, as to the terms on which she was living with the defendant, who was a tavern-keeper in the city of Montgomery, which, in some particulars, contradicted the plaintiff's testimony given on the trial. The plaintiff then offered a paper, signed by the defendant and others whilst the plaintiff was living with him, which certified to the good character of the plaintiff. The defendant objected to the introduction of this paper, but his objection was overruled; and the said paper was thereupon read as evidence to the jury, only of the declarations of the defendant that the plaintiff was of good character; and to this ruling of the court the defendant excepted." The admission of this evidence is now assigned as error.

HILLIARD & THORINGTON, for the appellant.

WATTS, JUDGE & JACKSON, *contra*.

RICE, C. J.—In civil cases, evidence of the general character of a *party* is not admissible, except in certain actions, the very nature of which, as disclosed by the proceedings, amounts to notice that the character of the parties, or some of them, is of particular importance; such as actions for slander, criminal conversation, and breach of marriage contract.—Ward v. Herndon, 5 Porter's Rep. 382; Pearsall v. McCartney, at the present term; Rhodes v. James, 7 Ala. R. 574; Anderson v. Long, 10 Serg. & Rawle, 55; 1 Greenl. on Ev. § 54, *et seq.*

In an action of *assumpsit*, where the declaration contained only the common counts, the facts that the plaintiff had, under our statute, made herself a witness to prove her own account, —that the defendant, under the same statute, had made himself a witness to contradict her testimony in some particulars; and that he had introduced the testimony of a disinterested witness, showing "some conversations of the plaintiff, as to

the terms on which she was living with the defendant, who was a tavern-keeper in the city of Montgomery, which contradicted the plaintiff's testimony given on the trial in some particulars,"—will not authorize her to prove her good character, by the declarations of the defendant, or in any other mode. The plaintiff's character was not put in issue by the pleadings, nor by the evidence for the defendant. It was her claim, or cause of action, and not her character, that was assailed by the evidence for the defendant.—See the authorities above cited, and 1 Greenlf. on Ev. § 55.

It does not appear that she was asked, on her cross-examination, whether she had not had the conversations testified to by the witness for the defendant. Her own conversations, in relation to the matter in controversy, were original and proper evidence against her, whether she made herself a witness or not. Her own voluntary act, in making herself a witness, could not create in her the right to prove her good character after her conversations were proved; when it is clear she would not have had such right, if she had not been examined as a witness.

If, instead of making herself a witness, she had proved by a disinterested witness the same facts which she proved by her own oath, and the defendant had thereupon merely introduced evidence of her conversations, which contradicted the testimony of her witness, this, of itself, would not have authorized her to prove the good character of her witness; and she certainly cannot stand on higher and better ground than her witness would occupy.

The court below erred in admitting the evidence of her good character; and for that error, its judgment is reversed, and the cause remanded.

STODDER vs. GRANT & NICKELS, USE, &c.

[TROVER FOR CONVERSION OF CERTAIN BOXES OF TOBACCO.]

1. *Exhibits to bill of exceptions must be identified by reference.*—Letters copied into the transcript as exhibits, but not made part of the record by appropriate reference in the bill of exceptions, cannot be considered as any part of the record.
2. *Amendment of complaint by change of plaintiffs.*—Where an action of trover is brought in the name of the assignor, for the use of the assignee for the benefit of creditors, and the evidence shows that the conversion took place after the assignment, the complaint cannot be amended so as to authorize a recovery.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

This action was brought by Grant & Nickels, late partners, suing for the use of John D. Hutchinson, against David Stodder, to recover damages for the conversion of eighty boxes of tobacco. The defendant pleaded, 1st, the general issue; 2d, a special plea to which a demurrer was sustained, and which it is unnecessary to notice; 3d, "that defendant is a general factor and commission merchant in Mobile, and said Grant & Nickels were merchants residing in Montgomery, and employed defendant as their factor and commission merchant to attend to their business in Mobile; that in the course of their business, before the said tobacco was received by defendant, said Grant & Nickels became indebted to defendant in a large sum, to-wit, the sum of \$2,500, for moneys advanced, &c., and being so indebted, to-wit, on the 1st January, 1854, they put said tobacco in his possession, being at the time the owners thereof, and directed him to sell the same as such factor and commission merchant; that said sum of \$2,500 is still due and unpaid, and he holds and retains said tobacco for the purpose of satisfying said sum, so far as it will go, as he well may; and therefore he says that he does not unlawfully detain the said tobacco."

The plaintiffs demurred to this special plea, but the demurrer was overruled; and they then replied, 1st, "that said

Grant & Nickels did not, while owners of said tobacco, put the same in the possession of the defendant, and direct him to sell it as factor and commission merchant"; 2d, "that said Grant & Nickels were induced to put their tobacco in the hands of defendant, and to direct him to sell the same, by the fraud and misrepresentations of said defendant, who has wrongfully converted the same"; and, 3d, "that said Grant & Nickels gave specific directions to said defendant as to the sale of said tobacco, and that said directions have not been complied with, but the defendant has wrongfully converted said tobacco."

"On the trial," as the bill of exceptions states, "the plaintiffs, Grant & Nickels, proved that they purchased in New York the tobacco sued for, and shipped it to Mobile to Thos. L. Brothers, to be forwarded to them at Montgomery. They also proved the value, and read in evidence the deed of assignment executed by them to Hutchinson, for the benefit of their creditors, dated 9th March, 1854. They proved, also, that they tendered the expenses of the shipment, &c., of this tobacco from New York, to said defendant, before this suit was brought, and demanded the tobacco; and that it was not delivered by him. The defendant then proved that he was the factor and commission merchant of said Grant & Nickels, for the sale of cotton, and they were indebted to him as such, for money advanced them, about \$1,400; that he also carried on the business of receiving and forwarding goods, but this branch of his business was carried on in the name of Thos. L. Brothers, who was merely his clerk, and who had no interest at all in said receiving and forwarding business. He also offered evidence to show that said Grant & Nickels knew that said receiving and forwarding business, though done in the name of Brothers, was exclusively (for) the benefit of said defendant; and proved that said Grant & Nickels resided in Montgomery, and were indebted to him, as factor, in the sum of about \$1,400, and as receiving and forwarding agent, in the sum of about \$1,600. He then introduced two letters from said Grant & Nickels, one dated January 23, 1854, before said assignment, and the other dated —, 1853; and proved that, in consequence of said letter of 23d January, the tobacco was not sent up to Montgomery, but remained

with him, until after said assignment, in his warehouse, where it was deposited on its arrival from New York at Mobile, when the agent of the assignee demanded the same of him; that, after this demand, he turned over said tobacco to Dorrance & Sons, as his own, and they have sold a part of it as his property.

"On this evidence, the defendant requested the court to charge the jury as follows:—

"1. If they believe that the business of receiving and forwarding the goods of Grant & Nickels was done in the name of Thos. L. Brothers, but was in fact done by David Stodder, and for his benefit; and if they further believe that Grant & Nickels instructed Stodder to retain and sell the tobacco, or to hand it over to another for the purpose of sale, then such instructions gave a lien to Stodder, for the whole balance due him on the receiving and forwarding account, previous to the receipt of such instructions.

"2. If the jury believe that Grant & Nickels, before the assignment, were indebted to David Stodder, as a factor; and if they further believe that said Stodder held the tobacco under the instructions of the letter of Grant & Nickels dated January 23, 1854, and under said instructions handed over the tobacco to Dorrance & Sons, for sale on his own account, —then he had a right to do so, and has a lien on the tobacco, or its proceeds, to secure the debt due him as factor from Grant & Nickels.

"3. If the jury believe that Stodder, as receiving and forwarding agent, determined to hold the tobacco as a factor, under the letter of January 23, 1854, then he had the right to retain said tobacco, until his factorage account was paid.

"4. If the jury believe that Stodder claimed only a lien on the goods at the time of the assignment, and not that he had the property, then the legal title passed by the assignment to Hutchinson, and the suit should have been in his name.

"5. If the jury believe that the defendant held the tobacco according to the instructions of the letter dated January 23, 1854, at the time of the assignment, then the suit ought to have been brought in the name of Hutchinson."

The court refused all these charges, and the defendant excepted to each refusal.

"The bill of exceptions, with the things therein contained," is now assigned as error.

E. S. DARGAN, for the appellant, contended,—

1. That the charges asked, touching the defendant's lien as factor and consequent right to retain, asserted correct legal propositions.—Russell on Factors, (48 Law Library,) top pp. 127-32.

2. That the fourth and fifth charges ought to have been given, because, on the supposed state of facts, the action should have been brought in the name of Hutchinson, the assignee.—Goodwin v. Lloyd, 8 Porter; 237; Foster v. Goree, 5 Ala. 424.

R. B. ARMISTEAD, with whom was NAT. HARRIS, *contra*:

1. The letter found in the record is no part of the bill of exceptions, and cannot be considered for any purpose.—Quigley v. Campbell & Cleaveland, 12 Ala. 61.

2. The several charges asked, without reference to the letter, were abstract, and therefore properly refused.

3. On the question of lien, if it arises, see Russell on Factors, m. p. 205-7; Story on Agency, § 362.

4. It is immaterial whether the conversion took place before or after the assignment. It would have been the duty of the court below, on motion, to strike out the name of the party improperly joined; and this court will consider the amendment as made accordingly.—Code, § 2130; Boddie v. Ely, 3 Stew. 182.

CHILTON, C. J.—1. We cannot regard the letters found in the record as any part of it, as they are not made a part of the bill of exceptions by any appropriate reference to them. It is needless, therefore, to discuss the question of lien, since the charges involving it are clearly abstract; and the decision of the court, sustaining a demurrer to the second plea, has not been assigned for error.

2. The last charge should have been given; for, assuming the facts to be as therein stated, the legal title to the tobacco vested in Hutchinson, the assignee of the plaintiffs, and the subsequent conversion would give him, and not Grant & Nick-

els, a right of action. In such case as this, the action must be brought in the name of the person having the legal title, Code, § 2129. Section 2130 does not cure the defect; for, here, the action is not brought in the name of the party having the legal title, in the aspect of the facts presented by the charge; and hence Hutchinson, for whose use the suit is brought, is not the real party, or, in the language of this record, "the sole party on the record." He, then, can only be considered a party to receive such recovery as the plaintiffs, Grant & Nickels, can obtain; and having, in this view, no right, they can recover nothing.

To strike out the names of the present plaintiffs, and to insert that of Hutchinson, would not be "to add new parties plaintiffs," as provided by section 2403, but to strike out the only plaintiffs on the record, leaving none to add to, and thus discharging the whole action. When all the plaintiffs are stricken out, the case is at an end. We will not now undertake to define the exact limit of our present statute of amendments; but we think it quite clear, that it was not intended to go to the extent of making a total change of parties, either plaintiffs or defendants. The phraseology employed does not admit of such extraordinary latitude. Such, too, has been our previous decision upon the point.—*Leaird v. Moore*, 27 Ala. Rep. 326.

As, therefore, the court below has no power, under the statute, to make Hutchinson plaintiff instead of Grant & Nickels, we cannot consider the record as amended in this court. The result is, that the judgment must be reversed, and the cause remanded.

TURNER vs. STETTS, ALLEN & GILL.

[ASSUMPSIT ON THE COMMON COUNTS FOR MONEY HAD AND RECEIVED.]

1. *Construction of policy of insurance.*—A provision in a policy, that "property held in trust, or on commission, must be insured as such, otherwise the policy

will not cover it," includes everything in which the insured has only a qualified interest, with the possession, while the ownership is in a third person.

2. *When assumpsit for money had and received does not lie.*—Assumpsit on the common counts cannot be maintained to recover money received by the defendant from an insurance company, under a policy effected by him, in his own name, on certain property some of which belonged to the plaintiffs, when the money was not received, either in whole or in part, on account of plaintiffs' property, and their property was not in fact covered by the policy.

APPEAL from the Circuit Court of Macon.

Tried before the Hon. JOHN GILL SHORTER.

This action was brought by the appellees, who sued as partners, against Matthew Turner, in September, 1852. The declaration contained all the common counts. The facts proved on the trial, as disclosed by the bill of exceptions, so far as they have any bearing on the points decided by the court, may be thus stated: In November, 1851, the plaintiffs purchased from the defendant, at a sale of the property belonging to Crawford & Turner, certain materials for making carriages, buggies, &c., amounting in value to \$868, for which they executed their note. At the time of the sale, the defendant agreed with plaintiffs, that, instead of requiring them to give personal security for the payment of the purchase money, he would take their own note, and they might work up the materials, and defendant would either take their work and sell it, or they might themselves sell it and turn over to him the notes and accounts,—the proceeds to be credited on their said note. During the same conversation, one of the plaintiffs remarked, that they intended to insure the materials; whereupon the defendant replied, that it would be unnecessary, as he intended to insure the building in which the materials were, and which belonged to him, and that he would at the same time insure the materials in his own name; and the plaintiffs assented to this arrangement. In December, 1851, the defendant effected an insurance against fire, on said building and materials, to the amount of \$8,000, in his own name, and in the same policy, and paid the entire premium; but it was not known to the agent of the insurance company who took the risk, that any other person than the defendant was interested in the property. The policy contained a stipula-

tion in these words: "Property held in trust, or on commission, must be insured as such, otherwise the policy will not cover such property; and, in case of loss, the names of the respective owners shall be set forth in the preliminary proofs of such loss, together with the respective interests therein." In May, 1852, the building and materials were consumed by fire. The defendant afterwards presented a claim to the insurance company for \$8,000, which the agent of the company refused to pay, insisting that the policy was void, because the defendant had included in the policy property which did not belong to him; but he offered to pay the defendant two-thirds of the assessed value of all the property which he could prove to be his. The defendant could only prove that the building, which was assessed at \$4,500, was his absolute property, and he refused to accept the agent's offer. After several interviews between the defendant and the agent, and on applications to the insurance company, the defendant accepted the \$3,000 offered by the agent, and delivered up the policy. The agent refused to pay anything on account of the said materials, and the said \$3,000 was paid entirely on account of the building.

"The court charged the jury, that if they found from the evidence that the defendant sold goods to the plaintiffs, on a credit; and that it was agreed between them that the goods should be worked up, and that the defendant should hold the manufactured article to sell, in discharge of the plaintiffs' said indebtedness, or that the defendant should have the proceeds of the sale of such articles, if sold, to be applied in discharge of the plaintiffs' debt; and that it was likewise agreed that the defendant should insure such goods, in his own policy, and in his own name, for the benefit of the plaintiffs and himself; and that he did afterwards insure them in his policy, in his own name, with his own property; and that he subsequently received \$3,000 from the insurance company, in discharge of the entire policy, although the company paid this amount only in regard to the individual property of the defendant,—the plaintiffs would be entitled to recover their proportion of this sum, after deducting their proportion of the insurance money paid by the defendant."

The defendant excepted to this charge, and asked the court

to instruct the jury, "that if he (defendant) had no interest, absolute or qualified, in the plaintiffs' said materials included in said policy, and effected an insurance on said goods in his own name, the plaintiffs are not entitled to recover, although the defendant may have received the money from the company; which charge the court refused, and the defendant excepted."

The charge given, and the refusal to charge as requested, with other matters which it is unnecessary to notice, are now assigned for error.

CLOPTON & LIGON, and GEO. W. GUNN, for appellant.

ELMORE & YANCEY, *contra*.

GOLDTHWAITE, C. J.—The evidence disclosed by the record shows, that Turner, against whom the action was brought, had effected a fire insurance on a building of his own, and also on certain stock and materials belonging to Stetts, Allen & Gill, who were the plaintiffs below; that the insurance on all was taken by Turner in his own name, and in the same policy,—it not being known to the insurers that any other person than himself owned or was interested in the stock, &c.; and that the policy contained a condition, to the effect that it would not cover "property held in trust," or on commission, unless insured as such.

These words of the condition, as to trust property, are not to be construed in a strict or narrow sense (1 Phil. on Ins. 3 ed. 267), and must, therefore, be held to include every thing in which the assured had possession, and a qualified interest,—the ownership being in a third person; and with this clause in the policy, it is evident that the insurers would not be legally responsible, for any loss upon the materials and stock owned by the appellees, if not insured as trust property.

As the present action is for money received by Turner, to the use of the plaintiffs below, and if neither he nor the plaintiffs could have recovered of the insurers, and the money was not received by him, either in whole or in part, on that account, then it is clear that such money would not be received to the use of the plaintiffs, and they could not recover in this suit.

The first charge was in conflict with these views, as it as-

serted the right of the plaintiffs to recover, without reference to the legal liability of the insurance company, or whether the money received by the defendant was on account of it. The jury were instructed, in effect, that they must find for the plaintiffs, although the amount insured on their materials could not be recovered of the company, and was not paid to, or received by the defendant, on account of the loss.

What we have said must, of course, be understood as confined to the present action. Had the defendant been sued for failing to cover the risk by his policy, a different question would have been presented.

Judgment reversed, and cause remanded.

RICE, J., having been of counsel in this case, did not sit.

LIVINGSTON ET AL. vs. ARRINGTON.

[ASSUMPSIT ON NOTE GIVEN FOR PURCHASE MONEY OF SLAVE—PLEAS, FAILURE OF CONSIDERATION AND FRAUD.]

1. *Warranty in bill of sale of slave construed.*—In a bill of sale of a slave, the words, "which said negro I do warrant and defend unto him, the said L., his heirs and assigns forever," are a warranty both of soundness and title.
2. *Bill of sale construed most strongly against maker.*—The salutary rule, that a written instrument, the language of which is of doubtful import, or capable of two constructions, must be construed most strongly against the maker, is applicable to bills of sale of slaves.
3. *Binding effect of judicial decisions.*—In the construction of a warranty in this case, the court adhered to the construction placed on a similar warranty in *Duff v. Ivy*, 3 Stew. 140; and the decision was based, partly, on the fact that that case has been acquiesced in for more than twenty-five years, and has probably been acted on as a rule of property in many instances.
4. *General warranty of soundness covers what defects.*—A general warranty of soundness does not cover visible and external defects, which are plain and obvious to the purchaser,—such as the eye can discover and enable him to comprehend; but it covers all other defects, even though the purchaser is informed of their nature, character and extent.

APPEAL from the Circuit Court of Perry.

Tried before the Hon. E. W. PETTUS.

This action was brought, in August, 1852, by Nicholas W. Arrington against John S. Livingston and others, and was founded on the defendants' promissory note for \$400, dated January 1, 1850, and payable twelve months after date, which was proved to have been given, in part, for the purchase money of a slave, named Malinda, sold by said Arrington to Livingston. On the trial, as appears from the bill of exceptions, after the plaintiff had read the note in evidence, the defendants proved that it was executed in payment for the slave Malinda, and then offered the bill of sale in evidence, which is copied in the opinion of the court. The consideration expressed in the bill of sale was \$680; but \$80 of this sum was for the hire of the slave for the year preceding the sale. The defendants proved that the slave was unsound at the time of the sale; that she had been unsound for several years previously; that her unsoundness rendered her valueless to Livingston; and that she died within six months after the sale. Dr. Peterson, one of the physicians who prescribed for her during her sickness, testified that the slave had irregular menstrual discharges, caused by ulceration of the *os uteri*, and accompanied with dyspeptic derangement of the stomach, and functional derangement of the liver; that the disease was not incurable, though of difficult cure; that her symptoms showed that she had been laboring under the disease for a considerable length of time, until it had become incurable; that he attended her for several months, until she finally died from the disease. "The plaintiff then proved that Livingston hired said slave, and had her in his possession, from the spring of 1849 to the time of the sale; that during this time, while in his possession, she was sick several times; that several times, during that period, he called in a physician to attend her, at intervals of from three to six weeks; that she was diseased during that time as described by the witness Peterson; that said physician, before the sale, informed Livingston of the character and extent of the disease under which said slave was laboring; and said witness stated, that he informed Livingston of the nature and extent of said disease, and that this information was communicated by him in the spring of 1849, and fully all through that year."

On this evidence, the court charged the jury,—

“1. That the bill of sale, given by Arrington to Livingston, for the slave Malinda, did not contain any warranty of soundness of said slave.

“2. That if Livingston was apprised of the nature, character and extent of the disease under which said slave was laboring at the date of sale, before he purchased her, then he could not resist a recovery in this case.”

The defendants excepted to these charges, and they are now assigned for error.

I. W. GARROTT, for the appellants, contended,—

1. That the first charge, as to the construction of the warranty, was erroneous.—Duff v. Ivy, 3 Stew. 140.

2. That the second charge was likewise erroneous, because the evidence did not bring the case within the principle that patent defects are not covered by a general warranty.—Thompson v. Botts, 8 Missouri, 710; Wilson v. Ferguson, Cheves, 190; 2 Supp. U. S. Digest, p. 721, §§ 227-31; Parsons on Contracts, 459, and note.

WM. M. BROOKS, *contra*:

1. The warranty contained in the bill of sale, is a warranty of title only, and not of soundness.—Roseman v. Hughey, 1 Rice, 437; 4 Missouri, 14; 3 Hill, 299; 2 Bibb, 616; 16 Vermont, 525. The argument on which the decision in Duff v. Ivy, 3 Stew. 140, is predicated, does not apply to this case; for, here, the words would not otherwise be nugatory. Warranties in the sale of slaves, in the absence of an express stipulation, do not run with the slave, as in the sale of real estate.—9 Dana, 44. This bill of sale does contain such a stipulation, and would protect a purchaser from Livingston. A warranty of soundness applies to the condition of the article at the time of the sale, while a warranty of title extends to all future time. The words, “his heirs and assigns forever,” are words of perpetuity, which refer to the future, and are only used in reference to title. They here serve to explain the preceding words, and show that no warranty of soundness was intended.

2. A general warranty does not extend to defects which,

at the time of the sale, are known to the purchaser.—Story on Sales, § 354; Dyer v. Hargrave, 10 Vesey, 505; Margetson v. Wright, 7 Bing. 605; Schuyler v. Russ, 2 Caines, 202; Dana v. Boyd, 2 J. J. Marsh. 587; Brittan v. Israel, 3 Hawks, 222; Long v. Hicks, 2 Humph. 305.

RICE, C. J.—More than a quarter of a century ago, in Duff v. Ivy, 3 Stew. Rep. 140, this court decided, that a warranty of soundness, as well as of title, was contained in a bill of sale in the following words: "Received of Abraham Duff three hundred and fifty dollars, in full payment for a negro named Charity, which I warrant and defend unto the said Duff." (signed) "Thomas Ivy."

The bill of sale which we are called on in the case at bar to construe, is in the following words: "Received, this 16th day of January, 1850, of John S. Livingston, the sum of six hundred and eighty dollars, payment in full for the purchase of negro girl Malinda, which said negro I do warrant and defend to him, the said John S. Livingston, his heirs and assigns forever. In evidence of which, I have hereunto set my hand and seal, day and date above-written."

(signed) "Nicholas W. Arrington."

Our opinion is, that the warranty created by the words, "I do warrant and defend to him, *his heirs and assigns forever*," is not less extensive than the warranty created by the words, "I warrant and defend unto him." We cannot hold that the superadded words, "his heirs and assigns forever," operate in favor of the warrantor, to diminish the extent of his warranty.

It is a salutary rule, applicable, as we think, to all such instruments as those above set forth, that a written instrument is to be construed most strongly against the maker; that when he has used in it language of doubtful or double import, it is to be taken in its strongest sense against him; and that, if it is capable of two constructions, it should receive that which is most unfavorable to him.—Hogan v. Reynolds, 8 Ala. Rep. 59.

In view of this salutary rule, and of the fact that the decision made in Duff v. Ivy has been acquiesced in as the law of this State for more than a quarter of a century, and has

probably been acted on as a rule of property in many instances, we shall adhere to and maintain that decision. We hold, therefore, that the bill of sale executed by Arrington to Livingston contains a warranty of soundness, as well as of title, and that the court below erred in its first charge to the jury.

We wish it noticed, that what we have above decided is in reference to the warranty of a slave—a *personal chattel*; and that we do not intimate that any thing we have above decided would be applicable to a warranty as to *land*.

The rule, that a general warranty does not cover defects *plain and obvious to the purchaser*, applies only to defects which are external and visible,—such defects as *the eye* can discover and enable the purchaser to comprehend. That rule has no application to the defects of the slave Malinda, as the same are disclosed in the testimony in this record.—Parsons on Contracts, 459, note (i).

The charges of a court must be construed with reference to the evidence. The second charge of the court in this case, when thus construed, is erroneous.

We deem it unnecessary to notice the other questions presented on the record. For the errors of the court below, in its charges to the jury, its judgment is reversed, and the cause remanded.

KERN vs. BURNHAM.

[BILL IN EQUITY TO SET ASIDE FRAUDULENT SALE MADE BY GUARDIAN TO WARD DURING MINORITY.]

1. *Laches in seeking rescission of contract fatal to relief*.—A party who seeks the rescission of a contract, on the ground of fraud, must move within a reasonable time after the discovery of the fraud. What is a reasonable time must depend on the circumstances of each particular case. Here, a rescission was refused, because the infant, after attaining his majority, and with knowledge of the fraud, accepted from his guardian a deed for the land, remained in possession more than seven years after the sale, and more than five years after the discovery of the fraud, and showed no excuse for his delay.

APPEAL from the Chancery Court of Macon.

Heard before the Hon. JAMES B. CLARK.

BARNES, and WILLIS & WILLIAMS, for the appellant.

CLOPTON & LIGON, and GEO. W. GUNN, *contra*.

GOLDTHWAITE, C. J.—The object of the bill is, to set aside a fraudulent sale of land, made by a guardian to his ward, during his minority, and to compel an account.

The chancellor suppressed the depositions of two of the witnesses who were examined on the part of the complainant; and his action in this respect is assigned as error. But it is unnecessary to go into an examination of the question presented by this assignment, for the reason, that we are satisfied that, if the evidence which was excluded had been received, it could not affect the decision of the case upon its merits.—Gould v. Hays, 25 Ala. 426, 431.

Placing the case, therefore, on the position most favorable for the appellant, by regarding the depositions referred to as legal evidence, still we do not think that the case made is a proper one for the interference of equity.

The sale which the complainant seeks to rescind was made in 1843, and he entered into possession, which he retained up to the filing of the bill, the exact time of which is not shown by the record, but the subpoena bears date in February, 1851; so that, in the absence of any other evidence, we may fairly presume it was early in that year. It is shown, also, that, in 1845, after he was of full age, and after he had obtained a knowledge of the fraud which had been practiced upon him, he accepted a deed from the defendant for his separate interest in the lands which were the subject of the sale, which had been divided, and his portion allotted to him. A few days afterwards his guardian had a final settlement of his trust; and we agree with the chancellor, that, from the evidence, we are bound to infer that, on such settlement, he executed a receipt in full. He remains in possession more than seven years after the sale, and more than five years after the discovery of the fraud, and after he became of full age, without moving either by suit or otherwise; and for this long delay, no excuse, or explanation, is given, or attempted. The rule is,

that the party who wishes to rescind, should at least move in a reasonable time after the discovery of the ground on which he expects to avoid the contract; and if he fails to do this, the law presumes he waives the fraud, or other ground of rescission, and affirms the contract.—Johnson v. Johnson, 5 Ala. 90; Pintard v. Martin. 1 S. & M. Ch. 126; Halls v. Thompson, 1 S. & M. 443. What is a reasonable time, must depend upon the circumstances of the particular case; but, as a general rule, whenever a party, with full knowledge of the fraud, elects to treat the contract as a valid and subsisting one, he cannot afterwards, in a court of equity, be allowed to dispute its validity.

Decree affirmed.

PALMER vs. BICE ET AL.

[ACTION FOR MALICIOUS PROSECUTION—VOLUNTARY NONSUIT.]

1. *Bill of exceptions necessary in voluntary nonsuit.*—When it becomes necessary for a plaintiff to suffer a nonsuit, on account of any decision of the court on the trial, he must (Code, §2357) reserve the point by bill of exceptions, if he wishes to revise the action of the court, even when the ruling is otherwise disclosed by the record.

APPEAL from the Circuit Court of Benton.

Tried before the Hon. THOMAS A. WALKER.

This was an action for a malicious presecution, and was commenced in September, 1854. The defendants pleaded the statute of limitations of one year, to which plea the plaintiff demurred. The court overruled the demurrer, and the judgment entry recites that, "by reason of this ruling, the plaintiff was forced to take a nonsuit, which he did;" but the point was not reserved by bill of exceptions. This ruling is now assigned as error.

M. J. TURNLEY, for the appellant.

JAMES B. MARTIN, *contra*.

RICE, C. J.—After a plaintiff has voluntarily taken a nonsuit, his right to reinstate his case, or to review errors committed in it, by writ of error or appeal, is the mere creature of the statute.—*Mahoney v. Chandler*, 7 Ala. Rep. 732.

As the right is the creature of the statute, its extent must be determined by the statute.

The first act in this State, upon the subject, is the act of 4th February, 1846, (Pamphlet Acts of 1845-6, p. 35,) the first section of which declares, "that in all cases where it may be necessary for a plaintiff, in any proceeding at law, to enter a nonsuit, by reason of the determination of the court, before which such proceeding may be pending, upon a matter of law, it shall be lawful for the plaintiff to move the supreme court, at the ensuing term, to set aside such nonsuit; when the supreme court shall consider the points of law arising upon said nonsuit, and set aside, or confirm the same, as the law shall be found." The second section declares, "that if the record shall not, of itself, disclose the point upon which such nonsuit may depend, such point or points of law shall be exhibited by bill of exceptions, and the party may have his writ of error, as in other cases in which writs of error are allowed by law."

Under this act, the cases of *Shields v. Byrd*, 15 Ala. Rep. 818, and *Duncan v. Hargrove*, 22 Ala. Rep. 150, were decided.

But the present case must be decided under section 2357 of the Code, which took effect on the 17th January, 1853, and before the commencement of this suit. That section is in the following words: "When from any decision of the court, *on the trial of a cause*, it may become necessary for the plaintiff to suffer a nonsuit, the facts, point, or decision, may be reserved for the decision of the supreme court *by bill of exceptions*, as in other cases."

The difference between the act of 1846 and section 2357 of the Code, is material and palpable. The former embraced not only cases where the points on which the nonsuit was taken, was exhibited by bill of exceptions, but also cases where the point on which the nonsuit was taken was upon the pleadings, and was disclosed by the record, although not ex-

hibited by bill of exceptions.—*Duncan v. Hooper, supra*; *Shields v. Byrd, supra*. The latter embraces only cases where “the facts, point, or decision may be *reserved* for the decision of the supreme court *by bill of exceptions*.”

The decision of the circuit court complained of by the plaintiff in the case at bar, was made upon the pleadings,—induced him to take a nonsuit, and could have been revised under the act of 1846. But that act was repealed by the Code, before this suit was commenced. And as there is no bill of exceptions in the present suit, the specific case provided for by section 2357 of the Code is not presented by the plaintiff; and we are therefore compelled to decline to revise the action of the circuit court which induced him to take a nonsuit. The nonsuit must stand, and the appeal be dismissed, at the cost of the appellant.

ANDREWS vs. ANDREWS.

[BILL IN EQUITY BY WIFE, AGAINST HUSBAND FOR SPECIFIC PERFORMANCE OF POST-NUPTIAL AGREEMENT.]

1. *Variance between allegations and proof*.—In a bill for specific performance, the failure to prove an alleged stipulation of the contract which the law implies is no variance; as where the bill alleges an agreement by the husband to settle property on the wife, *for her sole and separate use*, and the evidence fails to show the *exclusiveness* of the promised gift.
2. *Certainty requisite in contract*.—It was objected in this case, on the part of the defendant, that the uncertainty in the terms of the contract was an insuperable obstacle to its specific execution; but the court, while admitting that great certainty and precision in the averment and proof of contracts, whether verbal or written, were indispensable pre-requisites to their specific execution, held that, in view of the looseness and inaccuracy of language which showed that the parties and witnesses were uneducated, and construing the inartificial expressions of the parties by their subsequent declarations showing the meaning which they attached to the words, the terms of the contract were sufficiently certain.
3. *Contract must be fair, just, and reasonable*.—It is an unquestioned doctrine of equity, that only those contracts which are fair, just, and reasonable, will be specifically executed.

4. *Inadequacy of consideration.*—When the inadequacy of consideration shows that the contract is unfair, inequitable, or unconscionable, even though it might not be sufficient, if the contract were executed, to induce the court to rescind or set it aside, a specific performance will be refused.
5. *When equity will sustain and enforce post-nuptial voluntary settlement in favor of wife.*—Equity will sustain a post-nuptial voluntary settlement in favor of the wife, when executed, and will specifically enforce, as against any other person than the party himself, an agreement to make such a settlement; but it will not specifically execute such an agreement against the party himself, because, until executed, it is revocable.
6. *What consideration will sustain specific execution of agreement to make such settlement.* Neither the moral obligation of the husband, to provide for his wife, nor the fact that he received property by her, nor both these considerations together, will justify a specific execution of a post-nuptial agreement on his part to make a settlement on her; but when, superadded to these, there is a valuable consideration, irrevocably executed on the part of the wife, a specific performance will not be refused on account of the inadequacy of that consideration. In this case, the court decreed a specific performance of an agreement to settle on the wife slaves valued at more than \$4,000, in consideration of her relinquishment of dower in certain lands sold at \$2,600; it being also alleged and proved, that the husband received the slaves, with other property, by the wife, and that there were no children of the marriage to be provided for.
7. *When contracts concerning personalty will be specifically enforced.*—Generally, equity will not specifically enforce contracts concerning personal property, because there is a remedy at law in a suit for damages; but where there is no remedy at law, as in case of post-nuptial agreements between husband and wife, a specific performance may be decreed.
8. *Removal of husband as trustee.*—Where the wife files a bill against her husband to compel the specific execution of an agreement to make a settlement on her, and does not allege that she is separated from him on account of his improper conduct, or that he intends to remove from the State without her, or that she has reasons to apprehend a denial of her right to the property settled on her by the court, or that his habits are such as render him incapable of or unfit for the discreet and proper management of the estate, the court will not appoint another trustee in his stead, nor forbid his interference with the property.

APPEAL from the Chancery Court of Limestone.

Heard before the Hon. A. J. WALKER.

This bill was filed by Mrs. Mary Ann Andrews, suing by her next friend, against her husband, Richard I. Andrews, in February, 1852. The cause was submitted to the chancellor; for final decree, on bill, answer, and proof, at the May term, 1854; was held under advisement by him, by consent, until August; and a decree then rendered, in vacation, which con-

tains a full statement of the entire case, and which is here adopted as the opinion of the court. That decree is as follows:

WALKER, CH.—The bill alleges, that the complainant intermarried with the defendant in 1837, and has since lived with him; that her entire interest in the estate of her former husband went into the possession of the defendant, and became his property; that by the will of her father, which was admitted to probate in 1838, two negroes, Sarah and Pleasant, were bequeathed to her, 'during her natural life, and at her death to go to her bodily heirs'; that these negroes were reduced to possession by the defendant, who has also received other property, *jure mariti*, besides gifts from complainant's father, the amount of which is not known, and is not stated; that Sarah has since become the mother of seven children, who are also in the defendant's possession; that the defendant has property, aside from the negroes derived from the estate of complainant's father, adequate to the payment of his debts, and to his pecuniary independence; that, contemplating a change of residence to another State, the defendant sold his lands, in two parcels,—one to P. W. Wilkinson, and the other to Thos. G. Ezzell,—for the aggregate sum of \$2,600; that the complainant refused to assign her right of dower in these lands, until she was thereto induced by the defendant's promise that he would settle on her, to her exclusive use, the negro woman Sarah and her children; that complainant, influenced by this promise, joined in the conveyance of said lands by the defendant, who afterwards refused to comply with his promise, and was about to remove the negroes to the State of Arkansas; that the negroes are family slaves, between whom and complainant there exists a strong personal attachment; and that no mere remuneration by way of damages, or substitution of other property of equal general value, would compensate for their loss.

The bill prays for an injunction *pendente lite*, for a specific performance, and for such other and further relief as may seem just and equitable.

The material statements of the answer, which are necessary to a comprehension of the points discussed and decided in this opinion, are as follows: Respondent received only

\$300 from the estate of complainant's deceased husband, and from her father's estate the negroes described in the bill; but has received no other property 'by virtue of his relations to complainant.' He has sufficient property to pay all his debts; but, after their payment, there will be 'but a small property left.' He had two quarter-sections of land, one of which he sold to Wilkinson, for \$1,600, 'and the other to Thos. G. Ezzell, on a credit of one, two, and three years; having received from him, in part payment, a stud-horse, supposed to be worth about \$400, and the \$600 being only payable in one, two, and three years.' The answer denies 'that complainant refused to relinquish her right of dower in the land sold to Wilkinson, without a pecuniary equivalent therefor'; and proceeds to say that, '*after signing the deed to Wilkinson, some conversation occurred between respondent and complainant, and respondent replied that he was willing for her to have her stuff.*' At the time complainant relinquished her dower to Ezzell, she told respondent, that she would sign the deed, provided he would give her Sarah and her children; to which respondent replied, 'that he had told her what he would do *after* she had relinquished her dower to the tract sold to Wilkinson. She then repeated the proposition, that she would sign it, provided respondent would give her Sarah and her children; 'respondent replied, that she might take them in an hour, if she wanted to'; whereupon she signed it. '*This is the only contract, and all of the contract, that was made between respondent and complainant, in relation to her relinquishment of dower in the lands of respondent,—if contract it can be called.*' The negroes claimed by complainant are worth between \$4,000 and \$5,000, and respondent did not regard the conversation above stated as a contract. At the time complainant relinquished her dower, respondent had only six negroes, besides Sarah and her children, which were together worth about \$4,100; the remainder of his property, besides his crop, brought at auction about \$300; and the crop sold for \$720. Since the relinquishment of dower, respondent has paid various debts, amounting in the aggregate to \$3,400; and he owes other debts, but principally as surety. The answer admits the defendant's refusal to settle the negroes on complainant, and denies that complainant has any par-

ticular or special attachment for the *children* of Sarah; but says nothing as to complainant's attachment to Sarah, or of the attachment of the negroes to her; nor does the answer admit or deny 'that no mere remuneration by way of damages, or substitution of other property, could compensate complainant for the loss of the negroes.' The answer alleges, that the complainant, after relinquishing her dower, abandoned respondent, and refused to go with him to Arkansas; and that the contingent right of dower in the Ezzell land was not worth more than \$200.

I have not set forth above everything contained in the bill or answer, but only so much as seemed necessary to manifest the points in controversy.

It will be perceived, that the defendant denies that the complainant was induced to relinquish her dower in the Wilkinson and Ezzell tracts of land, by his promise to settle upon her the negroes Sarah and her children. If it be conceded that the answer impliedly admits the contract, that complainant should have the negroes, in consideration that she *had* assigned her dower in the Wilkinson tract, and *would* assign it in the Ezzell tract; it remains to be determined, whether the denial of the answer, that the contract was made before the assignment of dower in the Wilkinson tract, and induced that assignment, renders it necessary for the complainant to prove by two witnesses, or by one witness with corroborating circumstances, the correctness of the bill as to the disputed point of time when the contract was made, and the inducement to it. The bill and answer are clearly at issue, as to the point of time when the contract was made, and as to the inducement to the defendant's promise. Now, if the law requires the complainant to sustain the bill, as to the controverted points, at all, the defendant is entitled to the benefit of his sworn denial on those points. The authorities clearly show, that the complainant must establish her contract, even as to the consideration, as it is alleged.—1 Greenl. Ev. § 68; Freeman v. Swan, 22 Ala. 106; Flake & Freeman v. Day & Co., *ib.* 132. If the complainant is required to establish the contract averred, it must be proved by two witnesses, or by one witness with corroborating circumstances; and to determine whether she has sustained the

bill by the required measure of proof, it is necessary to look to the testimony.

Mrs. Beckham proves a distinct admission by the defendant that 'he had given up' Sarah and her children to complainant, to relinquish her dower in the land to Wilkinson and Ezzell. William P. Long says, that he presented the deed to Wilkinson to complainant, to sign; that complainant told defendant that she had signed the deed, and that she wanted him to do as he had promised,—to give her up her stuff, or truck, which her father had given her,—to which defendant replied, that he would do what he had said'; that when the defendant retired, for the purpose of allowing his wife to sign the deed to Ezzell in his absence, (which was supposed to be necessary,) she called him, and told him that she had not signed the deed, and that she did not intend to do so, unless he would give her up Sarah and her children; that the defendant replied, that he had told her what he would do, in the presence of the witness, when she had signed the other deed; that complainant persisted in her requisition, that she would not sign the deed, unless he would say that he would give her up Sarah and her children; that defendant said, she might take them in an hour, and afterwards remarked to him, 'What good did she think his simple promise, without going into writing, would do her.' Mrs. Stinnett testifies, that the defendant told her, that all he wanted complainant to do was to sign his land to him, and he would give her up her property.'

The complainant's declarations, proved by Eliza West, and brought out by defendant's question, are evidence, and show that the complainant was to give up her interest in the land, while the defendant was to give up to her Sarah and her children.

I do not regard Patterson's deposition as irreconcilable with Mrs. Beckham's; the apparent inconsistency between them may be accounted for, upon the supposition, either that neither of them heard the entire conversation to which they depose, or that they recollect different parts of the conversation. Having reconciled the testimony of these two witnesses, without impugning the veracity of either, and there being no other conflict, apparent or real, between the

testimony of defendant and complainant as to the contract, the next inquiry is, whether the proof establishes the contract as alleged in the bill.

The depositions of the witnesses, whose testimony on this point I have abridged above, when construed in reference to each other, in reference to the restricted admissions of the answer, and in reference to the looseness and inaccuracy of language characterizing the expressions of uneducated parties and witnesses, establish with satisfactory certainty the contract as alleged, except that none of the witnesses show that the *exclusiveness* of complainant's right was a subject of special stipulation. This, however, can make no difference, as the law implies that portion of the contract alleged which is not proved. If the husband make a conveyance to his wife, the law will intend that it was for her separate use; and the same reason which sustains that doctrine, irresistibly impels us to the conclusion, that an agreement by the husband to settle on the wife will be intended to be for her separate use.—*McWilliams v. Ramsey*, 23 Ala. 816; *Williams v. Maull*, 20 *ib.* 720.

At the hearing, it was earnestly contended on the part of the appellant, that the uncertainty in which the proof left the question as to what was the contract of the parties, was an insuperable obstacle to the specific performance. I concur with the counsel for the defendant, in the opinion that great certainty and precision in the averment and proof of contracts, whether verbal or written, are indispensable prerequisites to their specific performance; but my examination has led me to accord to the complainant's case a compliance with the exactions of the rule. To sustain this conclusion, let us again recur to the testimony.

We learn from Long's deposition that, after the complainant had signed the deed to Wilkinson, she addressed the defendant, and said, "that she had signed the deed, and that she wanted him to do *as he had promised*,—to give her up her stuff, or truck, which her father had given her; to which the defendant replied, that he would do what he had said." From this conversation the candid inquirer cannot fail to infer an acknowledgment by the defendant, under circumstances entitling it to the greatest weight as evidence, that he had

agreed, before complainant's transfer of her dower in either of the tracts of land, to do that which complainant expresses by the homely and somewhat obscure language, "give her up her stuff, or truck, which her father gave her." If, by the words "stuff or truck which her father gave her," she meant the entire property bequeathed by her father to her; then the contract proved is not identical with the contract alleged; because complainant's father bequeathed her other property; besides Sarah and her children. But subsequent occurrences conclusively show, that the parties understood these words in a sense consistent with the contract alleged. When the deed to Ezzell was signed, complainant required, before signing the deed, that the defendant should give her up "Sarah and her children"; and defendant replied, that he had told her, in the presence of the witness Long, when she signed the first deed, what he would do. Complainant persisted in her requisition, that defendant should say he would give her up Sarah and her children; to which, at length, defendant distinctly assented, by saying "that she might take them in an hour." The fair construction of this conversation is, that the complainant, before signing the deed to Ezzell, required a repetition of the previous contract; that the defendant objected to repeating the contract, but re-affirmed it, by saying that he would do what he had previously promised; and that he at length yielded to complainant's persistency.

The construction which imputes a reference by the parties, in their contract, to Sarah and her children as the subject of the contract, is confirmed by the testimony of Mrs. Beckham, that defendant admitted, after the execution of both deeds, that he had given up Sarah and her children to complainant. This testimony leaves no room for doubting that the defendant himself understood the negroes named to be the subject of the contract; and he will not be permitted to gainsay a construction sanctioned by his own admission.

The inartificial character of the language used, both by the witnesses and by the parties, forbids me to give any prominence or serious consideration to the apparent inconsistency of the other testimony with Mrs. Beckham's, in reference to the use by her of the words "had given up." I can well conceive that one unskilled in the use of language, as was evi-

dently the case with complainant, might say, in seeking an admission of the contract to settle upon her the negroes, "Have you not given up the negroes to me?" I must regard the evidence of Mrs. Beckham as corroborating that of Long, and reconcilable with it; and to this may be added, if further confirmation or greater security can be necessary, the evidence of Mrs. Eliza West.

It is an unquestioned doctrine of equity, that only those contracts which are fair, just and reasonable, will be specifically performed. The case of *Gould v. Womack and Wife*, 2 Ala. 83, recognizes the principle, that when the consideration of a contract is so disproportioned to the value of the thing agreed to be conveyed, as to evidence the want of fairness, equity and justice, a specific performance will be refused. The cases which define the inadequacy of consideration necessary to induce a court to rescind, or set aside, or annul a contract, are based upon a principle different from that which applies in cases where a specific performance of an unexecuted contract is sought, and are, in my judgment, not available as arguments for the complainant.—See *Hoot v. Sorrelle*, 11 Ala. 399; 2 *Story's Equity*, § 769; 1 *ib.* § 244; *Beck v. Simmons & Kornegay*, 7 Ala. 771; *Judge v. Wilkins*, 19 *ib.* 765; *Juzan v. Toulmin*, 9 *ib.* 686.

Whether a court of chancery will compel the performance of an unexecuted contract, depends upon judicial discretion, to be exercised consistently with law. If the court finds the contract unfair, unjust, inequitable, or unconsejorable, on account of the inadequacy of the consideration or other cause, it will not execute the contract. Now, if the assignment of complainant's contingent right of dower was the only consideration which induced the defendant's promise, this court could not, consistently with the principles settled in *Gould v. Womack*, *supra*, and in *Casey v. Holmes*, 10 Ala. 788, afford its sanction to the complainant's application. I think, however, the bill substantially avers, and the proof establishes, that there was another additional inducement to the contract.

We learn that the motive of the contract was to provide for the wife, from the statement in the bill, that complainant refused to relinquish her dower, without a pecuniary equiva-

lent "*which would provide for her future wants.*" The bill avers, also, that the complainant had a meritorious and equitable claim to a settlement, on account of the property received by her husband *jure mariti*. A contract may be as well sustained by an implied, as by an express consideration. The fair and reasonable implication from these averments in the bill, from the facts and conversations proved, and from the admissions in the answer, is, that neither the complainant in asking, nor the defendant in making the promise alleged, was prompted alone by the consideration of the relinquishment of dower. Why does the defendant agree to give negroes of the value of \$4,000 or \$4,500, to procure a relinquishment of the contingent right of dower in land which he was selling for \$2,600. No plea of incapacity, of duress, of fraud, or of imposition, is set up. What conceivable motive, then, unless we violate the rules of law by allowing him to say that he intended to defraud his wife, can be attributed to him, than a design to make a provision for her out of the property bequeathed to her by her father? The stress laid, in all the conversations between the parties, upon the fact that the negroes were received through the wife, is persuasive to show that reference was had to that fact in making the contract; and it is a most significant fact, bearing on this question, that the defendant, in his answer, admits that, after his wife had signed the deed to Wilkinson, he said "he was willing for her to have her stuff." Why does he characterize the property in question as "her stuff?" He himself says that the title had already vested in him. How, then, was it "her stuff?" Only because that, with other property, had been derived through his wife, and he conceded to her a moral right to at least a part of it. Besides, this remark was made after the complainant had signed the deed, and, it is inferrible from the answer, in immediate connection with her performance of that act. Now, why this willingness for her to have the negroes, and why the qualification of the negroes as "her stuff," in immediate connection with her signing the deed? The plain import of the thing is, This is "your stuff": it is already yours morally; and on that account, and because you sign the deed, I will give it up to you.

It must be remembered, too, that the complainant and de-

defendant have no children, the fruit of their intermarriage. With that fact in view, and taking into consideration the proportion which Sarah and her increase bore to the entire property derived by the defendant through his wife, it will be clear that, aside from the relinquishment of dower, there was provided nothing more than a suitable provision for the complainant. Had application been made to a court of chancery, before the defendant reduced the property to possession, a settlement on her, probably of the whole, certainly of not less than half of it, would have been made.—Atherly on Marriage Settlements, m. p. 374.

I conclude, that the bill substantially avers, and the proof, aided by the admissions of the answer, shows, that the obligation to provide for the complainant, and the moral right springing out of the legacy received by his wife, were inducements to the defendant to make, and to the complainant to exact, the promise of a conveyance of Sarah and her children; and that this court ought not, on account of the inequality of the consideration, to refuse to the complainant a specific performance.

Although this court will sustain a voluntary settlement in favor of the wife, *when executed*, I admit that it will refuse to specifically perform, as against the party himself, an *agreement* to make a voluntary settlement. It will, however, in favor of the wife, enforce an agreement to make a settlement, against the heir, or any other person than the party making the contract.—Atherly on Marriage Settlements, marginal pages 183 to 186, and 131 to 134. It must be conceded, also, that the reception by the defendant, some years before, of his wife's legacy, which he had reduced to possession, could not, *per se*, constitute a consideration for a promise to convey.—5 J. J. Mar. 545; Atherly on Marriage Settlements, marginal pages, 156, 164, 166, 301, 303, 304, 305. Then neither the moral obligation of the defendant to provide for his wife, nor the fact of his having received an estate by his wife, nor the two together, would, of themselves, justify this court in enforcing a promise to convey, superinduced by those considerations; but, when superadded to a valuable consideration, irrevocably executed on the part of the complainant, they will impel a court of equity to withhold its refusal of a specific

performance on account of the disproportion of the valuable consideration.

Why is it that an executed contract, based upon the moral considerations which I have mentioned, will be sustained, while an unexecuted agreement, based upon the same considerations, will not be enforced, *against the party making the agreement*? Why is it that an agreement to make a settlement, if founded upon these considerations, will not be enforced *against the party to the agreement*, but will be enforced *against his heir*? By reference to Atherly on Marriage Settlements, pages 131 to 134, it will be seen that, while there are respectable authorities to show that a voluntary agreement to convey will be enforced in favor of the wife, even against the settler himself, the better opinion is, that it ought not to be enforced, because, like a will, it is revocable. There is no other ground, upon which the doctrine, that an enforcement will be granted against the heir of the settler, and not against the settler himself, can be maintained, than that the power of revocation, *locus penitentiae*, is reserved to the party making the agreement. Upon what other conceivable basis can such a distinction, between the right as against the heir and as against the ancestor, rest?

In this case, the defendant cannot have the power of revocation, because, superadded to the moral consideration, there is a valuable consideration, executed on the part of the complainant. I do not think that the defendant could even rescind or set aside the contract in equity, without doing violence to the decisions in the cases of Judge v. Wilkins and Juzan v. Toulmin, *supra*; and, *a fortiori*, he could not, of his own volition, revoke it. If, then, the admixture in the transaction under review of a valuable consideration deprives the contract of its revocable character, shall a performance be refused on the ground that it is revocable? There is only one reason why an agreement to make a settlement upon the wife will not be executed against the husband, on account of the moral consideration involved; and that is, that the party making the agreement has the power of revocation. In this case, there is no power of revocation, and therefore the rule does not apply.

Why is it that a specific performance will not be decreed,

when the consideration is grossly inadequate? It is because the inequality of the consideration proves that the contract was inequitable and unconscionable. Indeed many of the authorities go so far as to hold that inadequacy of consideration, unless accompanied by fraud or imposition, will not induce a court to refuse a specific performance; and such, perhaps, would be a fair deduction from the reasoning of Judge Dargan, in *Judge v. Wilkins*, 19 Ala. 771. See, also, *Seymour v. Delaney*, 3 Cowen, 445; *Garnett v. Macon*, 2 Brock. 185; *White v. Thompson*, 1 Dev. & Bat. The contract may be sustained in this case; and yet it may be conceded that inadequacy of consideration, when it shows that the contract is unfair and unconscionable, justifies the refusal of a specific performance. To determine whether the inadequacy of consideration shows the contract to be unfair and unconscionable, we must look to the circumstances surrounding and immediately connected with the contract. Looking to the facts, that there were no children of the marriage, that complainant was defendant's wife, and that defendant received a considerable estate by his wife, out of which she had exacted no settlement, no impartial mind can conclude that complainant, when she assigned her dower, did not give enough to render the defendant's agreement fair, equitable and just.—See *Gosden v. Tucker*, 6 Munford, 1; in which case, I think it fair to infer that similar considerations to those which I have set forth influenced the court.

The consideration of marriage settlements is never closely scanned. Why, then, should the considerations of agreements for marriage settlements be closely scanned?—Atherly on Marriage Settlements, 165, *et seq.*; *Pinney v. Fellows*, 15 Vermont, 525. In *Brown v. Jones*, 1 Atk. 189, a declaration of Lord Hale's is approvingly quoted, to the effect that, in family agreements, a court does not nicely investigate the value of the estates, but only whether it is a fair and honest agreement.—See *Stapleton v. Stapleton*, 1 Atk. 2. In this case, it is an important fact, that the defendant has induced the complainant, acting on his promise, to part with a right of value to her. Is he not, therefore, estopped from saying that the contract must not be performed? However this

may be, it is clear that the court, in such a case, ought to struggle hard to enforce the contract against him.

The fact that personal property is the subject of this contract, does not in any wise militate against a specific performance. The reason why a court of chancery does not specifically perform contracts in reference to personal property generally, is, that there is a remedy at law in a suit for damages. In this case, there is no remedy at law: the contract is void at law. The authorities are clear on the point. *Atherly on Marriage Settlements*, 90; 2 *Story's Eq.* § 1372; *ib.* §§ 716, 726.

I have examined, with the care it merits, the argument of the complainant's solicitor, designed to show that I should remove the defendant from the office of trustee, or hold that he will not be clothed with that office by law as to this property; and I am compelled to dissent from it. If the bill showed that the complainant was separated on account of the improper conduct of the latter, or that the defendant intended to remove from the State unaccompanied by his wife, or that there were grounds to apprehend the denial of the complainant's right after it was settled by this court, or that the defendant's habits were such as to render him incapable of or unfit for the discreet and proper management of the estate, I might, by a decree, have appointed a trustee, or forbid his interference with the property; at least, I should have carefully examined the proof, with a view of so deciding. Under the allegations of the bill, however, I cannot do more than establish the complainant's separate interest in the property.

I have considered all the arguments presented by the counsel on both sides in their written briefs; and I would here give the result of my examination, but that I do not desire to extend this opinion beyond its present unusual length. I have found among the papers no written exceptions for the defendant; and I do not pass upon complainant's exceptions, because I have decided the case on the merits, in her favor, without the testimony excepted to.

The register will enrol and enter on the minutes of the court the following decree:

1. It is ordered, adjudged, and decreed, that complainant's

exceptions to testimony, marked, filed, and numbered from one to eleven inclusive, be made a part of the record in this case.

2. It is ordered, adjudged, and decreed, that defendant's demurrer be overruled.

3. It is ordered, adjudged, and decreed, that the title to the negro woman Sarah, and her children Anthony, Angelina, Jenny, George, John, and Hannah, heretofore vested in the defendant, Richard I. Andrews, be, and the same is hereby, divested out of him, the said Richard I. Andrews, and vested in the complainant, Mary Ann Andrews, to her sole and separate use, and independently and exclusively of her said husband.

4. It is further ordered, adjudged, and decreed, that the said defendant, on or before the first day of the next term of the chancery court for the 28th chancery district of the State of Alabama, shall execute and deliver to the register of the chancery court for said chancery district, for the complainant, a conveyance by him to her of the above-named negroes, to have and to hold the same to her sole and separate use.

5. It is further ordered, adjudged, and decreed, that the defendant pay the costs of this suit, to be taxed by the register.

From this decree the defendant appealed, and he here assigns it as error; while, on the part of the appellee, there are cross assignments of error, which it is unnecessary to notice.

WM. H. WALKER, for the appellant, and E. J. JONES, *contra*, submitted the case on written arguments, of which the subjoined briefs are abstracts,

Points and authorities for the appellant.

1. There is a fatal variance between the allegations and proof. The bill alleges a contract, by which defendant, in consideration that complainant would relinquish her right of dower in certain lands sold to Wilkinson and Ezzell, promised to give her, for her separate use and benefit, certain negroes known as Sarah and her children. The proof shows a promise "to let her have her stuff which her father had given her," which would include the boy Pleasant, as well as Sarah and her children; that this promise was made after

complainant had relinquished her dower in the Wilkinson tract of land, and to induce her to relinquish her dower in the Ezzell tract; and there is no proof whatever of the allegation that the gift was to the separate use of the complainant. In this state of doubt and uncertainty as to material terms of the contract, a specific performance cannot be decreed; for the law requires that the contract itself must be certain and definite; and must be proved as alleged.—1 Younge, 346; 4 Watts & Serg. 329; 1 Madd. 382; 3 Yerger, 18; 1 Johns. Ch. 131; 2 Wheaton, 336; 14 Peters, 77; 5 Wendell, 638; 2 Sumner, 295; 4 Porter, 297; 5 *ib.* 345; Clements v. Kellogg, 1 Ala. 330; Gibson v. Carson's Adm'r, 3 *ib.* 420; Freeman v. Swan, 22 *ib.* 106; Crabb's Adm'r v. Thomas, 25 *ib.* 212; 18 *ib.* 353.

2. Under all the circumstances of the case, if the contract had been proved as alleged, a court of equity will not enforce it. The contingent right of dower in the Ezzell tract of land is proved to have been worth not more than \$100; and the right of dower in the Wilkinson tract, according to the relative prices of the two tracts, may be estimated at \$160; while the negroes are proved to have been worth at least \$4,200. The gross inadequacy of this consideration, which is the only actual consideration proved or alleged, is sufficient, of itself, to induce the court to refuse a specific performance. The meritorious consideration which is merely suggested in the bill, and on which the chancellor sustained the agreement, is not alleged as any part of the consideration, nor is it established by the proof. The property received by the defendant, from the complainant's father, consisted of the two negroes, Sarah and Pleasant, and some \$800 in money. All the expense and trouble of raising the children of Sarah has been borne by him. Of the \$6,000 debts proved to be owing by him, the fair presumption is that a portion of the debts was contracted by the complainant. After the payment of these debts, the property left to the defendant is but a small pittance, the greater portion of which consists of lands in Arkansas, in which the complainant has a dower interest. The complainant, moreover, is entitled, under the will of her father, to a distributive share in certain slaves bequeathed to her mother for life; and these she may have settled upon her, by a decree of this court, for her separate use. The circumstances, too,

under which the defendant's promise was made, show that it was not intended as a contract, and it ought not to be so regarded. The conduct of the complainant, in inducing the defendant to believe that she would go with him to Arkansas, and to sell out all this property under this impression, and then exacting a promise that he would give her all her property, before she would relinquish her dower in the last tract of land, justified the defendant in meeting her on her own ground, and repelling strategy by strategy. On these points the following authorities are relied on: 1 Story's Equity, §§ 254, 246; Gould v. Womack, 2 Ala. 91; 6 Johns. Ch. 222; 5 Cowen, 521-35; 4 Peters, 311; 2 Strobhart's Equity, 2 Ala. 604; 9 *ib.* 685; 21 *ib.* 371; 7 *ib.* 71; 11 *ib.* 386.

Points and authorities for the appellee.

I. Is the contract proved as alleged? The answer is a qualified denial of the contract, but it is discredited as evidence.—Pharis v. Leachman, 20 Ala. 664; Gunn v. Brantly, 21 *ib.* 633. The answer is contradicted, as to the amount of property received by defendant from complainant's father, by the record from the orphans' court; and as to the amount of property owned by him, and his condition after paying his debts, by the witnesses Long, Ezzell, Stinnett, and others. If the answer is considered as evidence, the contract is supported by the testimony of W. P. Long, Mrs. Beckham, Eliza West, and McKinney.

II. Being proved as alleged, will the court enforce it?

1. At law, husband and wife are one, and their contracts are void; but equity treats them as distinct persons, capable of contracting with each other, of suing each other, and of having separate estates and interests.—2 Story's Equity, §§ 1368, 1372; Livingston v. Livingston, 2 Johns. Ch. 538; Garlick v. Strong, 3 Paige, 440; Hoot v. Sorrelle, 11 Ala. 396; Williams v. Maull, 20 Ala. 730; Shepard v. Shepard, 7 Johns. Ch. 60.

2. The wife's contingent right of dower is peculiarly known, is carefully guarded by the laws, and cannot be forced from her by her husband.—Owen v. Paul, 16 Ala. 131; Parks v. Brooks, *ib.* 529; Thrasher v. Pickard, 23 *ib.* 616. It occupies, therefore, as high a position as any other separate estate.

3. Several of these cases show that it makes no difference whether the contract is executed or executory.—Garlick v. Strong, *supra*; Hoot v. Sorrelle, *supra*; Livingston v. Livingston, *supra*.

4. The contract being between husband and wife, it was not necessary to use the words "sole and separate use."—Williams v. Maull, 20 Ala. 730; McWilliams v. Ramsey, 23 *ib.* 816; Gamble v. Gamble, 11 *ib.* 972; Puryear v. Puryear, 16 *ib.* 488; 2 Story's Equity, § 1373.

5. The adequacy of consideration is not material between these parties. The court will not regard the consideration, unless the inadequacy is such as to shock the conscience, and furnish conclusive evidence of fraud; which, as between these parties, could hardly be presumed.—Judge v. Wilkins, 19 Ala. 771; Juzan v. Toulmin, 9 *ib.* 686; Lawrence v. McCalmot, 2 How. (U. S.) 452; 3 Cowen, 446.

6. The relinquishment of dower was the only legal consideration; but the relation of the parties, and the fact that the property came from the wife, furnish strong additional motives and moral considerations.

7. The husband denies that he meant what passed for a promise. If this be true, he was attempting to practice a fraud on his wife; and, for that reason, he cannot be heard to complain.

8. The defendant is estopped. He made the promise, treated the consideration as sufficient, and stood by until his wife acted; and he cannot now be heard to dispute his promise.—Center v. P. & M. Bank, 22 Ala. 743; Steele v. Adams, 21 *ib.* 534; McCravy v. Remson, 19 *ib.* 430; Pool v. Harrison, 18 *ib.* 514.

III. What is complainant's remedy?

1. The contract should be specifically enforced. The complainant has done all she had to do, and can never be placed in *statu quo*.—Casey v. Holmes, Bott & Earle, 10 Ala. 777. All the terms of the contract are sufficiently certain; and, even if any doubt existed, the court, in a case like this, will struggle hard for the meaning.

2. If there be any uncertainty in regard to the lands, it can make no difference, because that part of the contract is executed. It would only be important in point of consideration;

so that, if all the negroes were to be given, it ought not to defeat this suit, because there is no doubt about those claimed. If there be any doubt, the wife is not claiming against that doubt.

3. A specific performance ought to be granted, because the negroes are family slaves.—*Baker v. Rowan*, 2 Stew. & P. 361; *Hardeman v. Sims*, 3 Ala. 747.

4. As to specific performance, see, also, *Pulliam v. Owens & Russell*, 25 Ala. 492.

But, if not entitled to a technical decree of specific performance, the complainant is nevertheless entitled to a decree for the negroes, on another ground.

1. She is not *sui juris*, and cannot sue at law on the contract. Upon that ground she has the right to come into equity, and that court must give her such relief as a court of law would give a party *sui juris*.

2. In a court of law, a party *sui juris* might recover these negroes on this contract. Detinue lies to recover specific personal property, whenever the plaintiff has the general property, and the right to immediate possession.—1 Chitty's Pl. 121. In this case, the property in the negroes, by the contract, would have vested in the vendee.—*Chitty on Contracts*, 375; *Screws v. Roach*, 22 Ala. 676; *Magee v. Billingsley*, 2 *ib.* 677.

3. Upon a recovery in detinue, the delivery of the property could be enforced by *distringas*.

4. In trover for slaves, the measure of damages is their value.—*Tatum v. Manning*, 9 Ala. 144; *Lee v. Matthews*, 10 *ib.* 682; *Sedgwick on Damages*, 260-70; *Worthy, Brown & Co. v. Patterson*, 20 Ala. 174; *Willis v. Dudley*, 10 *ib.* 933; 5 Conn. 222.

GOLDTHWAITE, C. J.—The decree of the chancellor is correct, both in its reasoning and results, and must be affirmed, at the costs of the appellant.

MCHENRY vs. WELLS, ADM'R, &C.

[ACTION AGAINST ADMINISTRATOR FOR MONEY HAD AND RECEIVED BY HIS INTERSTATE IN HIS LIFETIME—PLEA, STATUTE OF NON-CLAIM.]

1. *What constitutes a bar under statute of non-claim prescribed by Code.*—A bar to a claim against an estate cannot be made out, under the statute of non-claim prescribed by the Code (§ 1883), by uniting the time which elapsed before the Code went into effect, with the time which elapsed after that event.
2. *What constitutes a bar under statute of 1850.*—Under the act of 1850, (Pamphlet Acts 1849-50, p. 68,) a claim against an estate was barred, by the failure to present it to the personal representative, or to file it in the office of the probate judge, not within eighteen months from the grant of letters testamentary or of administration, but within eighteen months after the publication of notice by the executor or administrator.

APPEAL from the Circuit Court of Shelby.

Tried before the Hon. E. W. PETTUS.

The facts of the case are stated in the opinion of the court.

D. W. BAINE, for the appellant.

JOHN T. MORGAN, *contra*.

RICE, C. J.—This suit was commenced in July, 1854, by the appellant, to recover of the appellee, as administrator of Barnabas McHenry, deceased, one hundred and fifty dollars, alleged to have been collected and received by said Barnabas in his lifetime, from one Willis A. Morgan, for the appellant.

On the trial, there was some evidence tending to prove that, on the 16th November, 1850, the said Barnabas received of the appellant a note on said Morgan and others, for one hundred dollars, due 25th December, 1850, for which note the said Barnabas promised to be accountable to the appellant; that said Barnabas collected said note, and afterwards died; that eighteen months from the time letters of administration were granted on his estate, did not expire until the 17th day of April, 1853; and that on the 10th June, 1853, the appellant demanded the note of the appellee, who was unable to find it among the papers of his intestate, and who failed to account for it.

The court charged the jury, that "if they believed from the evidence that the claim had not been presented to the administrator, nor filed in the probate judge's office, within eighteen months from the time letters of administration were granted, then the claim sued upon would be barred by the statute of non-claim, and they must find for the defendant." To this charge the appellant excepted, and, duly reserving the same by bill of exceptions, took a nonsuit.

Section 1883 of the Code is in the following words: "All claims against the estate of a deceased person must be presented within eighteen months after the same have accrued, or within eighteen months after the grant of letters testamentary or of administration; and, if not presented within that time, are forever barred."

But the Code did not go into effect until the 17th January, 1853,—*fifteen months after letters of administration were granted to the appellee*. The provisions of the section above quoted are not retro-active. Their field of operation is the future. A bar to the claim sued on in this case cannot be made out *under that section*, by uniting the time which elapsed before the Code went into effect, with the time which elapsed after that event. If the claim was presented before that event, or within eighteen months afterwards, it is not barred *by that section*. Where letters of administration were granted several months before the Code went into operation, no bar to a claim against an estate can arise, *under section 1883 of the Code*, out of the mere fact that it "had not been presented to the administrator, nor filed in the probate judge's office, within eighteen months *from the time letters of administration were granted*."—*Rawls v. Kennedy*, 23 Ala. Rep. 240; *Henry v. Thorpe*, 14 Ala. Rep. 103.

We thus come to the conclusion, that the charge of the court is not authorized by the provisions of the Code; and we now proceed to show that it was not authorized by the law as it existed when the Code went into operation.

The first section of the act of 5th February, 1850, (Pamph. Acts of 1849-50, p. 68,) contains the following provisions, to-wit: "That if any executor, or administrator, shall fail to *give notice, as now required by law*, requiring all persons having claims against the estate of his testator or intestate to present

the same within the time limited by law, a recovery on such claims shall *not be barred by a failure to present the same within the time limited by law*, but the same may be presented *within eighteen months from the time of giving such notice* by such executor or administrator," &c.

This act certainly was of force from the 5th February, 1850, until the Code went into effect. Whether it continued of force afterwards, for the purpose of completing a bar to claims against estates, upon which it had begun to operate before the Code went into effect, we need not now decide. See *Rawls v. Kennedy, supra*. For, however that may be, it is clear that, under its provisions, the right was secured to the creditor of an estate to present his claim within eighteen months *from the time of giving the notice provided for by that act*; and that the charge of the court, in effect, denied this right, which evidently was in existence for at least fifteen months after the letters of administration were granted to the appellee. Where the notice contemplated by that act was not given, the mere failure to present the claim would not, by virtue of that act, constitute a bar.

The charge of the court below is erroneous; and therefore its judgment is reversed, the nonsuit set aside, and the cause remanded.

THOMPSON vs. LEA.

[MOTION TO DISMISS APPEAL AFTER JOINDER IN ERROR AND ARGUMENT.]

1. *Appellate jurisdiction of the supreme court.*—The appellate jurisdiction of the supreme court, in the revision of final judgments and decrees of the inferior courts, is derived from the constitution, (Art. V, §§ 1 and 2,) and is not restricted by the statutory provisions regulating appeals: the appeal, bond or security for costs, and certificate, required by the Code, (§§ 3016, 3041,) are not jurisdictional facts, but merely the prescribed means by which each particular case may be brought under the pre-existing jurisdiction of the court.—*Per Walker and Stone, JJ.*; while *Rice, C. J.*, held, that, however full and complete might be the appellate jurisdiction conferred by the

constitution, the public policy of the State, as disclosed and declared by the Code, required that that jurisdiction should not be exercised in favor of a party who did not comply with the requisitions of the statutes regulating appeals.

2. *Joinder in error waives defects in appeal.*—A joinder in error is a waiver of the appeal, bond, or security for costs, and of all defects therein, and a motion to dismiss the appeal afterwards comes too late. (Rice, C. J., *dissenting*.)

APPEAL from the Chancery Court of Perry.

Heard before the Hon. JAMES B. CLARK.

The transcript in this case was filed at the June term, 1854, to which the appeal was taken. Errors were assigned at the same term; and, after joinder in error, the cause was argued on the merits, and submitted. At the January term, 1855, an opinion was pronounced, which was afterwards withdrawn, on petition for a re-hearing, and a re-argument in writing ordered at the next term. At the present term, all the judges who heard the original argument at the bar having since resigned, the cause was remanded to the docket, and another argument ordered. A motion to dismiss the appeal was then submitted, which seems to have been predicated upon a defect in the appeal bond, in misdescribing the decree, and in being sued out in the name of only one defendant. The judges delivered their opinions on the motion *seriatim*.

WM. M. BROOKS, and JOHN T. MORGAN, for the motion.

I. W. GARROTT, with whom was ALEX. WHITE, *contra*.

STONE, J.—The appellate jurisdiction of this court is conferred by the constitution, and is co-extensive with the State.—Constitution of Alabama, Art. V, § 2. It lies, as a matter of right, on the application of either party, or their personal representatives, from any *final* judgment or decree of the chancery, circuit, or probate courts, “except in such cases as are otherwise directed by law.”—Code, § 3016. It follows, then, that in all cases, except those “otherwise directed by law,” when final judgment has been rendered by an inferior tribunal, the supreme court has jurisdiction of the subject-matter. This jurisdiction is not created by, or dependent for its existence on, the statutes of the State. If no statutory regulations were enacted, still the jurisdiction would exist;

and the court, in carrying out the purposes of its creation, would supply the means "necessary to give it a general superintendence and control of inferior jurisdictions."—Const. Art. V, § 2.

The constitution declares, that the appellate jurisdiction of the supreme court shall be subject to "such restrictions and regulations as may, from time to time, be prescribed by law." Article V, § 2, chapter 1, title 5, of the Code, contains the chief "restrictions and regulations" which the legislature have heretofore imposed. Section 3040 prescribes the time within which an appeal may be taken. Sections 3016 and 3041 enact, that "the clerk, register, or judge of probate, must certify the fact that such appeal was taken, and the time when, as part of the record"; and said section 3016 further provides, that a compliance with its provisions "gives the supreme court jurisdiction of the case." What is the proper construction of the words, "gives the supreme court jurisdiction of the case"? Not that the certificate *creates* the appellate jurisdiction of this court: the constitution had done that. The language, "appellate jurisdiction," is employed in contradistinction to original jurisdiction, and defines, *ex vi termini*, the subject-matter of that jurisdiction; namely, the right of "declaring and applying the law," to questions arising on final judgments and decrees of inferior courts. It is manifest, then, that the constitution confers on the supreme court jurisdiction over the *subject-matter*.

Neither does the certificate, except in a qualified sense, give jurisdiction over the person. The term "persons" simply denotes the *parties* who are to be affected by the decision of the questions arising on the record. Without parties, neither this court nor any other can pronounce judgment on the subject-matter. In courts of primary jurisdiction, the plaintiff voluntarily gives the court jurisdiction over his rights, by availing himself of the process which the law affords, to compel his adversary to litigate with him. The defendant is in this way brought into court; and thus those courts acquire jurisdiction over the "persons." Final judgment being rendered on the matter in controversy between the *persons* or *parties* litigating there, the *subject-matter* in dispute, and the *disputant parties*, become inseparably united; and this court can-

not consider the questions arising out of the former, except as they are in issue between the latter. Persons, or parties, constitute an indispensable element in the subject-matter,—final judgments,—and are in one sense necessarily implied in the constitutional grant of jurisdiction.

Seeing, then, that the jurisdiction of this court over subject-matter and persons, so far as the latter is an element of the former, arises under the constitution, can either the bond or certificate be properly regarded as a jurisdictional fact? To hold them such, is to declare that the solemn judgments of this court, pronounced on records wanting either the bond or certificate, or when either is substantially defective, are *absolute nullities*, and may be collaterally impeached, whenever and wherever they are offered in evidence.

The Code must be construed as a system of laws. Thus viewed, its obvious purpose was to simplify and harmonize legal proceedings. It abolishes, by implication, writs of error in civil cases, and substitutes appeals as a uniform rule. To apply to that rule the strict construction applicable to penal enactments, is to defeat, in this respect, the entire policy of the Code.

The most important change in the law of appeals, effected by the Code, is the requirement of *supersedeas* bonds, or security for costs, in all cases. The system being a new one, inexperienced or careless officers fall into many errors. Frequently the bond is defective in parties, or in the condition, and yet more frequently the certificate is informal. Sections 3016 and 3041 of the Code are a regulation of appeals, under section 2, article V, of the constitution. What are the nature and policy of this legislative regulation?

Section 3041 declares, that “no appeal can be taken without giving bond to supersede the execution of the judgment or decree, unless the appellant give security for the costs of such appeal.” Section 3016 enacts, that the certificate, in conformity with its terms, “gives the supreme court jurisdiction of the case.” In my opinion, the term “*jurisdiction*,” as found in this chapter of the Code, cannot properly be regarded as conferring power to declare or apply the law to either subject-matter or persons, technically so called. It gives jurisdiction over the case. It is the mode prescribed, by which a party

asserting rights against another, may compel that other, with or without his consent, to come into court, and have those rights litigated and passed on. It is the *evidence* on which the court acts in taking jurisdiction of the case,—the evidence that a final judgment had been rendered in the court below, and an appeal taken to this court; sufficient evidence for the purpose, but not the only evidence on which the court could act.

This mode is nothing more nor less than the same rule which governs the bringing of suits in the circuit court, as deduced from the various provisions of the Code affecting that question. The service of complaint and summons on the defendant brings him before the court, and gives jurisdiction of the case. It is the machinery by which the inherent power of the court to declare the law, is brought actively to bear on the parties; the process by which a complaining party may force his adversary into court, whether he is willing or not. The defendant, without service, may waive this privilege,—can come into court, and appear or plead, and thus give the court an unquestionable right to pass on the merits of the controversy. After such appearance and plea, no one will doubt the jurisdiction of the court over subject-matter and person, or the binding efficacy of its judgments.

So, I hold, that parties, between whom there exists a final judgment in an inferior court, may waive these pre-requisites, and rightfully invoke the action of this court. I do not hold that, under an agreed state of facts, or simulated record, we could entertain jurisdiction. Our power over such subjects is appellate only. But in all cases, in which final judgment has been rendered in a court of inferior jurisdiction, in a *bona fide* suit, this court possesses the constitutional power to revise such final judgments; and our decisions pronounced in such cases, whether brought here by appeal, or by consent, express or implied, are valid and binding on the parties to them. I cannot assent to the distinction, that this mode or formula is an indispensable pre-requisite in the one case, while it is universally conceded it may be waived and dispensed with in the other.

The bond or security for costs, required by section 3041 of the Code, was obviously intended to protect parties and the

officers of the court, against insolvent litigants. This legislative regulation is binding on us; and whenever the appeal bond or certificate is substantially defective, or entirely wanting, and the fact is in due time brought to our notice, we are bound to respond to the motion, and to repudiate the cause. While adjusting the rights of appellants, we must observe and guard the legal rights of all others interested in the record. But I hold that these mere property rights may be waived, without at all affecting the binding efficacy of our judgments. I hold, further, that when there has been joinder in error, arguments on the merits, or other act done which admits the case rightfully in this court, the motion to dismiss for insufficient or defective appeal, comes too late.—Boone v. Poin-dexter, 12 Smedes & Marshall, 640; Dayton v. McIntyre, 5 How. Pr. Rep. 117.

The appeal in this case was taken to the June term, 1854. At that term, argument on the merits was offered by both parties; and at the January term, 1855, a decision was pronounced by this court. On petition by appellant, a rehearing was then ordered; and at the present term, motion is for the first time made to dismiss the appeal, for alleged irregularity in the bond for costs. In my opinion, the irregularity cannot now be inquired into, and this court has jurisdiction of *the case*.

A majority of this court concur in overruling the motion to dismiss the appeal.

WALKER, J.—I lay down the following propositions, which, in my opinion, are maintainable both by argument and authorities: 1. Jurisdiction over the matter of errors, in the proceedings of the court below, is conferred upon this court by the constitution, unless its constitutional jurisdiction has been restricted by act of the legislature. 2. Sections 3016 and 3041 of the Code do not *restrict* the jurisdiction over the subject-matter conferred by the constitution, but simply prescribe the sole instrumentality by which the adverse parties to the suit below may bring the particular case under the pre-existing jurisdiction of this court. 3. The appeal, not being a restriction upon the jurisdiction over the subject-matter, may be waived by the appellee, whose rights in the par-

ticular case the appeal would have the effect to bring under the control of this court. 4. A joinder in error is a waiver of the appeal, and of the bond or security without which there can be no appeal.

1. The first of the foregoing positions is a necessary and uncontroverted deduction from the first and second sections of the fifth article of the constitution of the State.—*Durousseau v. The United States*, 6 Cranch, 312.

2. If the legislature has restricted the jurisdiction over the subject-matter, in such a case as this, by making it dependent upon the fact that an appeal bond, or security for costs, has been given, it results from sections 3016 and 3041 of the Code. The former of those two sections provides, that an appeal shall lie, as a matter of right, from any final judgment or decree of the chancery, circuit, or probate courts. The latter section says, that no appeal can be taken, without bond to supersede the execution or decree, unless the appellant give security for the costs of such appeal. Under these statutes, it has been decided by this court, that there can be no appeal, unless the bond or security for costs has been given. A different rule would do violence to the statutes. The legislature having, in the exercise of its constitutional authority, prescribed an appeal as the agency by which the law brings under the revisory power of this court cases where there has been a final judgment or decree, there is an implied exclusion of any other. To this effect are the decisions of the supreme court of the United States.—*Durousseau v. The United States*, *supra*; *Marbury v. Madison*, 1 Cranch, 174. It follows, that this court cannot, of itself, bring its revising power to bear upon the rights of the parties to the final judgment, in the absence of the bond and security for costs, without the one or the other of which there can be no appeal. But it does not follow, that this court has no jurisdiction over the subject-matter, or that the parties may not voluntarily subject their rights under the final judgment to the operation of that jurisdiction.

An appeal, in this State, is the mode of commencing a new and independent suit in this court, the object of which is a revision of the proceedings of the inferior court. It is the mode of initiating a judicial proceeding, before a court of competent

jurisdiction.—*Mazange v. Slocum & Henderson*, 23 Ala. 668; *Cook v. Adams*, 27 Ala. 294. The appeal, and notice of it, stand in the same relation to the revising suit in this court, in which the summons and complaint now stand, and in which the *capias ad respondendum* formerly stood, to the suit in the circuit court. They are alike modes of initiating a suit,—the law-appointed means of acquiring jurisdiction of the person, and bringing the case under the jurisdiction of the court. The parties may, in the circuit court, waive the antecedent proceedings entirely, and submit themselves to the jurisdiction of the court.—*Hodges v. Puckett & Ashurst*, 2 Ala. 301; *Bissell v. Carville & Carville*, 6 Ala. 503; *Callier v. Denson*, Minor, 19. As well may the proceedings initiating the suit in this court be waived, as those which commence the suit in the circuit court. That conclusion can only be avoided, by successfully maintaining that the sections of the Code above referred to restrict the jurisdiction conferred by the constitution. The giving of such an effect to those sections is not authorized by the language used. The restriction of jurisdiction cannot legitimately be implied from a statute which merely prescribes the means by which that jurisdiction is to be put in operation. There is nothing in the law which justifies the conclusion, that the legislature intended to subject the jurisdiction of this court over the subject-matter, and consequently the validity of its judgments, to such a test as the sufficiency of an appeal. In Mississippi and Florida decisions have been made, which are in point, and which sustain the argument of this opinion.—*Boone et al. v. Poindexter*, 12 S. & M. 649; *Curry v. Marvin*, 2 Fla. 411.

If the legislature intended, by the two sections of the Code above quoted, to exercise the power expressly conferred upon it, to regulate the jurisdiction of this court, it is clear that they have not proceeded further than to appoint the means by which that jurisdiction may be put in exercise over the case and the parties. There can be no reason why such a regulation should not be as much subject to the waiver of the parties, as the proceedings commencing any other suit prescribed by the legislature, when acting within the circle of its authority. The manifest intention of the legislature, by the statutes under consideration, as has always been held in

reference to kindred statutes, was to provide a protection for the appellee against the annoyance of groundless litigation by an insolvent adversary. A principle of public policy is no more involved here than in many other judicial proceedings, which the law requires should be preceded by security, and the want of which, it has been in this State uniformly decided, may be waived by the parties.

The element in the *jurisdiction over a case* which cannot be supplied by consent, is the *jurisdiction over the subject-matter*; and the reason why that cannot be given by consent is, that it must be conferred by the law. It is the authority of the court, and can be derived alone from the law. Whatever pertains merely to the bringing of the case under the operation of that jurisdiction, may be waived.—2 Bacon's Abridgment, 618; Ives v. Finch, 22 Conn. 101; State of Rhode Island v. State of Massachusetts, 12 Peters, 720; Boone et al. v. Poindexter, *supra*; Bostwick v. Perkins, Hopkins & White, 4 Ga. 50; Martin v. Higgins, 23 Ala. 176; Moore v. Fiquet, 19 Ala. 318; Merrill v. Jones, 8 Porter, 554; Wyatt v. Judge, 7 Porter, 37.

From the conclusion that the parties may waive the appeal, it is a necessary sequence, that a joinder in error shall amount to a waiver. It is an unequivocal act, implying a submission to the jurisdiction of the court, and has always been so considered.—Turnley v. Stinson, 1 Ala. 457; King v. McIlvane & Collier, 1 Porter, 286; Battle v. Wolf, 1 Cushman, 318; Dayton v. McIntyre, 5 Howard's Practice Reports, 114; and authorities above cited.

In Kentucky, Virginia, and New York, there are decisions, upon statutes somewhat like ours, that the security, upon which the appeal is demandable, is a matter pertaining to the jurisdiction of the case, and that therefore the courts must, upon motion, dismiss in the absence of such security.—Yarborough and Wife v. Deshazo, 7 Grattan, 374; Clinton v. Philips, 7 Monroe, 118; Langley v. Warner, 1 Comstock, 606.

In none of these cases was the question of waiver presented, or passed upon. In a New York case, in which the question did arise, it was decided, in effect, that the motion to dismiss would not be sustained, after the party has "appeared, answered, or proceeded in such a manner as to give the court

thereby jurisdiction in the case."—5 Howard's Prac. R. 114. The Virginia, Kentucky, and New York decisions are not opposed to the conclusion attained in this opinion, because they do not touch the question, and because it is based upon the concession of all that is decided in those cases. Whenever the question has been directly made, as far as my investigations have enabled me to discover, the authorities have uniformly held, that all the proceedings designed to bring the party into court, might be waived; and in the cases in which the appeal was dismissed, it was on motion of the appellee, and in the absence of a waiver.

There is no decision in this State irreconcilable with my conclusions. The doctrine of waiver, in reference to appeals under the Code, has never, until this term, been raised. There does not appear to have been any case, in which an appeal has been dismissed in this State after a joinder in error. In one case, (*The State v. Williams*, 26 Ala. 85,) it is stated, by mistake, that the dismissal was *ex mero motu*. In several of the cases, the cause was stricken from the docket, because the court had not acquired jurisdiction of the case. The question whether that jurisdiction could have been given by the parties did not arise. In *Carey v. McDougald*, 25 Ala. 109, there are two or three expressions in the argument of the opinion, which tend to a conclusion different from that to which I have attained. I regard the decision in the case of *Carey v. McDougald*, as a sound exposition of the law, and I entertain the highest respect for the opinions of the late court, and would be extremely reluctant to depart from them. It is, therefore, a source of congratulation, that, upon this important question, the convictions of my judgment have brought me in conflict with only two or three incidental expressions in the previous decisions of this court.

To deny to a joinder in error the effect of waiving an appeal, or deficiencies in it, would be productive of great injustice. It would permit appellees to conceal a detected deficiency in the appeal, until another appeal was barred by lapse of time, or until on the hearing in this court he might find the inclination of the court adverse to him on the merits. He would thus be able to wrong his adversary and speculate upon

the chances in this court. A rule which would be attended by such consequences, ought not to be inferred from the statute, unless it is required by the clearest language.

RICE, C. J.—The 2nd section of the 5th article of the constitution of Alabama is in the following words: "The supreme court, except in cases otherwise directed by this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State, under such restrictions and regulations, not repugnant to this constitution, as may, from time to time, be prescribed by law; *provided*, that the supreme court shall have power to issue writs of injunction, *mandamus*, *quo warranto*, *habeas corpus*, and such other remedial and original writs as may be necessary to give it a general superintendence and control of inferior jurisdictions."

"Appellate jurisdiction," and "a general superintendence and control of inferior jurisdictions," are both conferred by that section upon this court; but they are nevertheless distinct things, and must not be confounded. Under the former, this court can do no act unless it be either an exercise of appellate jurisdiction, or necessary to enable it to exercise appellate jurisdiction; for appellate jurisdiction means, jurisdiction to revise and correct the proceedings in a cause already instituted, and not to create a cause.—*Marbury v. Madison*, 1 Cranch, 175. Under the latter, this court may take *original jurisdiction* of divers applications; as, of an application by a member of the house, for a *mandamus* against the speaker, to compel him to certify to the comptroller the amount to which the member is entitled for mileage and *per diem* compensation; or of an application for a prohibition to a chancellor; or of an information, in the nature of a *quo warranto*, to try the eligibility of an individual to the office of a circuit judge held by him.—*Ex parte Morgan Smith*, 23 Ala. R. 94; *Ex parte Pickett*, 24 Ala. R. 91; *The State v. Porter*, 1 Ala. R. 688.

"A general superintendence and control of inferior jurisdictions" is, by the constitution, granted to this court unconditionally. "Appellate jurisdiction" is, by the very terms of the grant, *subjected to* "such restrictions and regulations, not repugnant to this constitution, as may, from time to time, be prescribed by law."

In the case at bar, we are not called on to decide any thing as to the power of "general superintendence and control of inferior jurisdictions." I allude to it merely to distinguish it from the "appellate jurisdiction" of this court. The important question now presented is, shall we *exercise* that "appellate jurisdiction," in favor of a party who has neither done nor offered to do what "the restrictions and regulations" "prescribed by law" required him to do, or shall we decline to exercise that jurisdiction and dismiss his appeal.

My opinion is, that the law requires us to decline to exercise that jurisdiction at his instance, and to dismiss his appeal.—*Durousseau v. The United States*, 6 Cranch, 312.

Every party who invokes the exercise of the jurisdiction of a court, is required to show *his right* to its exercise; and however full and complete the "appellate jurisdiction" of this court may be under the constitution, yet the public policy of this State in relation to appeals, as disclosed and established by the Code, requires us not to exercise that jurisdiction in favor of a party who has not complied (or offered to comply) with the "restrictions and regulations" prescribed in section 3041. That section explicitly declares, that "no appeal can be taken *without giving bond* to supersede the execution of the judgment or decree, unless *the appellant give security* for the costs of such appeal, to be approved by the clerk, register, or judge of probate."

Before the adoption of the Code, our statutes authorized the issue of a writ of error to the respective circuit and chancery courts, at any time within three years after the rendition of final judgment or decree by those courts, as matter of right, without money, bond, or security of any kind. The Code does not authorize the issue of a writ of error in any civil case. It confers the right to an appeal by section 3016; but, by section 3041, it explicitly declares, that "*no appeal can be taken without giving bond* to supersede the execution of the judgment or decree, unless *the appellant give security* for the costs of such appeal, to be approved by the clerk, register, or judge of probate."

Remembering that the statutes of force before the adoption of the Code never authorized an appeal without bond and

security; that they did authorize the issue of a writ of error, without bond or security of any kind, at any time within three years after final judgment or decree; that these statutes were succeeded and superseded by the Code; that it has fixed a much shorter time, within which an appeal must be taken, than was allowed by the former statutes for suing out a writ of error; that it does not authorize the issue of a writ of error in any civil case; that although, in section 3016, it speaks of an appeal as matter of right, yet in the same chapter, and in section 3041, it declares that "no appeal can be taken without *giving bond* to supersede the execution of the judgment or decree, unless *the appellant give security* for the costs of such appeal, to be approved by the clerk, register, or judge of probate",—I am forced to the conclusion, that the law, as found in section 3041, is to be regarded as a law of public policy, and not as a law conferring a mere privilege on the appellee, which he may waive at his pleasure. This public policy may be wise or unwise; but, whether it be the one or the other, it ought not to be defeated by this court. We do defeat it, if we hold that the appellee may *wave* the appellant's non-compliance with the "restrictions and regulations" prescribed by the Code. I cannot consent to apply the doctrine of waiver, so as to make it operate to *create a right* in favor of an appellant to *disregard* those "restrictions and regulations", and to overturn the clearly established public policy as to appeals. I have not been able to find any authority for such an application of that doctrine; and I think it better to stand on the plain letter of the Code, than to establish a precedent so defiant of its clearly expressed provisions, and so entirely unsupported by authority.

All the former decisions of this court, made since the Code went into effect, in relation to appeals, are founded upon the course of reasoning which I have above followed. And I differ from my brethren, in the opinion expressed, that their conclusion in this case does not conflict with those decisions. If the conclusion attained by my brethren in this case be correct, it annihilates the foundation and reasoning upon which only they can be supported. I adhere to the decisions heretofore made, and believe they are sustained by principle and authority.—*Carey v. McDougald*, 25 Ala. R. 109; *King*

v. McCann, 25 *ib.* 471; Hinson v. Preslor,* 27 *ib.* 643; Moore v. McGuire, 26 *ib.* 461; The Union Bank v. McBride, 2 Fla. Rep. 7; Gordon v. Camp, *ib.* 23; Curry v. Marvin, *ib.* 411; Boone v. Poindexter, 12 Smedes & Marsh. Rep. 640.

If the motion to dismiss the appeal in this case had been made at the first term after it came here, and before joinder in error, or argument on the merits, or continuance, my brethren would have agreed with me, that the motion should be granted. But they hold that the motion now made comes too late, and that the right to make it is waived by joinder in error and argument on the merits. My opinion is, that an appeal which is invalid for want of the bond or security required by section 3041 of the Code, when it comes into this court, *never can acquire validity while it is pending here*; and that *the right of an appellant to invoke the exercise of the "appellate jurisdiction" of this court cannot be created by the mere acts or omissions of the appellee after the case is brought into this court, but must exist before the case is brought here*, and must arise from his compliance with the requirements of section 3041 of the Code. The legislature having prescribed in the Code the "restrictions and regulations" which are to govern this court in the exercise of its "appellate jurisdiction", I cannot give my assent to a decision which arms the appellee with the power to alter the law, to defeat the public policy of the State as to appeals, and to relieve this court from its duty to obey and administer the law as enacted by the legislature.—Dourousseau v. The United States, 6 Cranch, 312; Tisdale v. Gandy, 1 Dev. R. 282; Fagan v. Jacocks, 4 Dev. Rep. 264; authorities cited *supra*.

DEW ET AL. vs. CUNNINGHAM ET AL.

[ACTION UNDER CODE ON BOND—JUDGMENT BY DEFAULT.]

1. *Defective service of process not available on error.*—The sheriff's failure to serve a copy of the complaint with the summons is a mere irregularity, which, after judgment by default, is not available on error.

2. *Constitutionality of Code.*—The constitutional provision (Art. III, § 23), that no bill shall have the force of a law until it be read on three several days in each house of the general assembly, does not require that everything which is to become a law by the adoption of the bill shall be thus read; nor does the provision (Art. III, § 1) prescribing the style of laws affect the validity of a body of laws, when the bill by which they were adopted pursued the prescribed form.

APPEAL from the Circuit Court of Pickens.

Tried before the Hon. GEO. D. SHORTRIDGE.

This suit was commenced on the 12th September, 1854. The return of the sheriff was in these words: "Executed the 23d September, 1854, by leaving a copy of this summons with each of the defendants." Judgment by default was rendered against the defendants, at the term to which the summons was returnable, on the 27th October, 1854; from which judgment they now appeal, and here assign the following errors: "1. The record does not show that the complaint was executed on the defendants, or a copy of it left with them. 2. The Code of Alabama, by virtue of which the proceedings in the record were had, was not made the law of Alabama in conformity with the constitution of the State."

ALEX. B. CLITHERALL, for the appellant:

1. The service of the summons alone is not sufficient to apprise the defendant of what he is called to answer, nor is it a compliance with the statute.—Code, § 2165.

2. As to the constitutionality of the Code: The constitution recognizes but one mode of enacting laws, namely, by "bill" introduced in either house. It further provides (Art. III, § 23) that "no bill shall have the force of a law until on three several days it be read in each house, and free discussion had thereon"; that "every bill, having passed, shall be signed by the speaker and president of the respective houses"; and (§ 1) that "the style of the laws shall be, 'Be it enacted by the senate and house of representatives of the State of Alabama, in general assembly convened.'" If, then, the constitution requires these acts to be done, does not the failure, or the refusal to do them, render the action of the legislature unconstitutional? The Code of Alabama is deficient in every

one of these constitutional pre-requisites. It was not introduced into either house as a bill. It was reported by the codifiers to the governor, and by him transmitted to each house. It was not received in either house as a bill; nor was it any time, by any action in either house, treated as a bill, or acted on as a bill. It was not read "in each house on three several days"; but, on the contrary, was not read once in either house. Nor was the reading dispensed with, as "in case of emergency", by a vote of four-fifths of either house: on the contrary, the house refused, by a deliberate and recorded vote of yeas 34, nays 44, to allow it to be read, upon the very ground that it was not a bill.—House Journal, 445. It has no enacting clause, or "style." It was not signed by the speaker and president of the respective houses. It was not approved by the executive, as required by the 16th section of the 4th article.

If the Code, then, be the law of Alabama, whence does it derive its vitality? From nothing but the act of February 5, 1852, which declares "that the code of laws prepared," &c., "is hereby received and adopted as the Code of Alabama." Can the legislature thus, "in short by consent," repeal the whole mass of existing laws, and substitute an entirely new system, not one clause of which has been enacted in conformity with the express requirements of the constitution? If it be said that the bill adopting the Code took a regular course, and was open to amendment, and that therefore the matter thus adopted was constitutionally adopted; the answer is, that there is no authority in the constitution for such a mode of legislation. No amendment of the bill adopting the Code could reach the Code itself. The journals show that this was often tried, and was always refused; and that the only alternative was, the Code or nothing. Had the Code been regarded as a bill, or as part and parcel of a bill, it was the right of any one member to insist on the reading, and it would have been open to amendment; but the journals show that the reading, though often called for, was refused, on the ground that the Code was not a bill, nor part and parcel of a bill; and that the reading "of the sections which embrace the most material changes in the existing laws" was likewise refused.—House Journal, 452.

If it be said that the question has been concluded by the adoption of Toulmin's, Aikin's, and Clay's Digests, the answer is, that those Digests were simply re-arrangements of existing statutes, and contain nothing as law which had not been previously regularly enacted. Not so with the Code: it is new matter *ab ovo*. Many statutes, and parts of statutes, unrepealed, are omitted from it; while many new provisions are inserted, and a new construction, in manner and matter, form and substance, given to the entire system. But, even if these Digests contained some alterations or modifications of the existing laws, made by the respective digesters, this would not cure a like defect in the Code. Such modifications or alterations were made without the warrant of the constitution, which cannot be amended or repealed by intendment; nor should its mandates be evaded by the easy method of declaring that certain requirements are merely directory.

LEWIS M. STONE, *contra*, made these points:

1. The service of process, as shown by the record, was sufficient.—Morton v. Bradley, 27 Ala. 640. But, if it were insufficient, the irregularity is not available on error.—Moore v. Fiquett, 19 Ala. 237; Roberts v. Beeson, 4 Porter, 167; Nabers v. Thomason, 1 Ala. 590; Mitchell v. Allen, 2 Stew. & P. 247.

2. The Code was adopted in pursuance of the 20th section of the 6th article of the constitution, which requires the legislature, within every ten years, to provide for a revision of the "body of our laws, civil and criminal," "in such manner as the general assembly may direct." The mode of adopting these revisions is discretionary with the legislature. At the session of 1849-50, an act was passed, providing for the appointment of commissioners to arrange and codify the public statutes of the States; and a supplementary act was passed, enlarging the powers of the commissioners. Under these acts, the Code was prepared, and reported to the ensuing session of the legislature; and at that session, an act was passed "for the adoption, printing, and distribution" of it. Whether it was ever introduced as a bill, or was read on three successive days in each house, or was discussed or amended in either house, makes no difference, since the legis-

lature had the right to determine the manner in which they would adopt it. Had it been altered, as it would have been if it had been read and discussed, its provisions would have been rendered contradictory and repugnant, and its value as a system of laws would have been destroyed. It was prepared by three of the ablest lawyers in the State, was approved by the governor, was referred to a special committee of both houses, was carefully examined by them, and its adoption as a whole recommended by them; and the bill reported by them, providing for its adoption and distribution, regularly passed through the course prescribed by the constitution.

WALKER, J.—Where there is no service of the process commencing a suit, it would be error in the circuit court to render judgment by default. If the service be merely irregular, the objection must be appropriately made in the court below, and can not be made for the first time in this court.—*Moore v. Fiquett*, 19 Ala. 237; *Roberts v. Beeson*, 4 Porter, 166; 3 *Chitty's General Practice*, 517-518; *Maverick v. Duffee*, 1 Ala. 433.

In this case, the service of the summons does not affirmatively appear from the sheriff's return to have been effected by a delivery of a copy of the complaint as well as the summons. Conceding that we must intend that the sheriff omitted to serve a copy of the complaint along with the summons, as the service of the summons itself was sufficient to bring the parties into court, we will regard that omission as a mere irregularity not fatal on error.

The judgment by default in this case was rendered at the return term of the process commencing the suit. This could only be authorized by the Code. It is contended by the learned counsel for the appellant, that the Code is unconstitutional, and that therefore the judgment by default was improperly rendered.

Three years have elapsed since the Code went into operation; and every judicial tribunal in the State, including this court, has been acting under it, and carrying out its provisions. This court has repeatedly rendered judgments, in matters of the highest importance, which have no sanction

whatever in the law, if the Code is unconstitutional. Some of the sections of the Code have been expressly held to be constitutional, which could not be the case, if the entire system were unconstitutional. These facts constitute a strong judicial authority against the position of the appellant's counsel, although it is not expressed in any direct decision upon the point.

It is argued, that the Code is not the law in this State, because, at the time of its adoption, it was not read upon three several days in each house of the general assembly. The constitutional provision is, that "no bill shall have the force of law, until on three several days it be read in each house, and free discussion had thereon."

The requirement of the constitution is, that every bill shall be read on three several days in both houses of the general assembly. We do not understand this to mean that every thing which is to become a law by the adoption of the bill must be read on three several days. Such a construction is not warranted by the language of the constitution. Our legislative annals afford many instances of the adoption by one comprehensive enactment of large masses of law, which were never read on three several days in both branches of the legislature. To this class of legislation belongs the statute, which provides for the punishment as at common law of misdemeanors for which no punishment is prescribed in our statutes. An act of this kind was adopted a great many years ago in this State, and has been continued in all subsequent legislation on the subject of the criminal law. It can not be supposed that the entire common law on the subject of misdemeanors, outside of the scope of our statutes prescribing punishment for offences, was ever read in the legislature at all. Nevertheless, this court has repeatedly recognized as binding in this State the common law which provides for the punishment of misdemeanors, for which no punishment was prescribed in our statutes. Aikin's Digest was by one statute "established" as the law; and all laws of a general and public nature, passed previous to a certain time, with the exception of laws relating to county boundaries, were repealed by the same statute. The force of law has been conceded by the people and every department of the government of this State to

Aikin's Digest. The effect given to Aikin's Digest by the courts was not simply that of affording evidence of what the law was, but of law itself. It has been held by this court to have effected the repeal of pre-existing law.

We do not think it could have been contemplated, in the adoption of the constitution, that every thing which becomes a law, as the result of the adoption of a bill, should be read on three several days in the legislature. It would exclude the power of making comprehensive enactments, which legislative bodies have always exercised, to so hold.

The first section of the third article of the constitution is as follows: "The legislative power of this State shall be vested in two distinct branches: the one to be styled the senate, the other the house of representatives, and both together the general assembly of the State of Alabama"; and the style of their laws shall be, "Be it enacted by the senate and house of representatives of the State of Alabama, in general assembly convened." It is contended, that the Code is not the law, because it has not the style prescribed. Conceding, for the sake of the argument, that the adoption of the style is necessary to the validity of an act of the legislature, it will not aid the appellants. The bill adopting the Code is preceded by the words designating the style of the laws, and that is sufficient. It would be impracticable to make the style precede every law called into force by act of the legislature. The style which heads the bill adopting the Code, may well be regarded as the style of the laws embraced in it.

The judgment of the court below is affirmed.

WILLIS, ADM'R, &C., vs. CADENHEAD.

[PETITION FOR DISTRIBUTION OF ESTATE OF DECEASED WIFE.]

1. *Statute of distribution (Code, § 1990), as to separate estates of married women dying intestate, construed.*—The provisions of the Code (§§ 1990, 1997), regulating the distribution of the separate estate of a married woman dying intestate,

Willis, adm'r, &c., v. Cadenhead.

do not apply to separate estates created by deed before the 1st March, 1848, although the marriage took place after that day; and the husband, in such case, takes nothing under the statute.

APPEAL from the Court of Probate of Butler.

The proceedings in this case were had on the petition of Anna E. Cadenhead, by her guardian, for distribution of the estate of her mother, Sarah A. S. Willis, of which George T. Willis, the surviving husband of the said Sarah, was the administrator. On the hearing of the petition, as appears from the bill of exceptions, "the petitioner proved that the said Sarah A. S. Willis, whose maiden name was King, first intermarried with one Isaac N. Cadenhead, and afterwards gave birth to the petitioner, who is her only living child; that the said Isaac N. Cadenhead then died, and the said Sarah afterwards, on the 3d October, 1852, intermarried with the defendant, George T. Willis; that the said Sarah died on the 21st July, 1853, and the said defendant administered on her estate on the 26th August, 1853; and that more than eighteen months had elapsed, after the grant of said letters of administration, before the commencement of this proceeding." The petitioner then introduced a deed of gift from Henry King, dated October 5, 1845, by which, in consideration of natural love and affection, he conveyed certain negroes to the said Sarah, who was his daughter, "to have and to hold to the said Sarah, in her own separate right, free and exempt from all debts or contracts whatever of any husband she may hereafter marry, and her heirs forever, in fee simple;" "which said deed was regularly proved and recorded as the law directs." She further proved, "that the slaves mentioned in said deed were returned by said administrator as a part of said estate; and that said deed was executed and delivered to her mother at the time it bears date. And the petitioner thereupon insisted, that she was the sole distributee of said estate, so far as the negroes named in said deed are concerned, and entitled to a decree of the court ordering the administrator to deliver them to her as such."

"The defendant proved, that he lived with the deceased, as her husband, from the time of their marriage until her death, on the 21st July, 1853; and that said slaves were in

the possession of the deceased, under said deed, at the time of his intermarriage with her, and remained in his and her possession until her death. And he thereupon insisted, that said slaves were subject to distribution between himself and said petitioner, and that the court ought to decree that he retain one-half of said slaves."

"Upon this state of facts, there being, as appeared from the proof, sufficient property, aside from said slaves, to more than pay all the debts of the estate, the court ordered, adjudged, and decreed, that the petitioner was entitled to the entirety in said slaves, and that the defendant deliver the same to her; whereupon the defendant excepted."

This decree is now assigned as error.

WM. P. CHILTON, for the appellant.

WATTS, JUDGE & JACKSON, *contra*.

RICE, C. J.—The provisions of sections 1990 and 1997 of the Code do not apply to the separate estate of a married woman, which was created before her marriage, by a deed executed in 1845, containing a provision that such separate estate should be "free and exempt from all debts or contracts whatever of any husband" she might thereafter marry.—*Gerald v. McKenzie*, 27 Ala. Rep. 166; *Friend v. Oliver*, 27 Ala. Rep. 532; *Cunningham v. Fontaine*, 25 Ala. R. 644; *Kidd v. Montague*, 19 Ala. R. 618; *White v. White*, 4 Howard's Practice Rep. 102; *Perkins v. Cottrell*, 15 Barb. Sup. Ct. Rep. 446; *Ratcliff v. Dougherty*, 34 Miss. Rep. 181; *Bronson v. Kinzie*, 1 How. (U. S.) Rep. 311; *Green v. Biddle*, 8 Wheat. Rep. 1.

By virtue of that deed, rights vested in her, which could not be divested, nor impaired, by any subsequent legislative enactment.—*Bronson v. Kenzie*, 1 How. (U. S. Sup. Ct.) Rep. 311, and other authorities cited *supra*. And we cannot presume that the legislature, in adopting the provisions of the Code in relation to separate estates, intended to violate the constitution by attempting to impair her rights under that deed. If sections 1990 and 1997 of the Code apply to her separate estate, we think it very clear that sections 1983, 1987 and 1988 would also apply to it; because, we believe the words "separate estate", as used in each of those several

sections, have precisely the same meaning and extent. And it is undeniable, that the legislature had no constitutional power to make the provisions of sections 1983, 1987 and 1988 applicable to her separate estate created by said deed. The fair conclusion is, that the legislature did not intend to apply the provisions of any of the sections above cited to her separate estate; or to any separate estate created by deed prior to the 1st of March, 1848.

Upon her dying intestate in July, 1853, leaving her only child and husband surviving, her husband is not entitled to any part of such separate estate under section 1990 of the Code, or any other statute provision; but all of such estate, after the payment of the debts and charges against the estate, belongs to her child, under sections 1572 and 1581 of the Code.

The counsel for the appellant has not argued any questions except such as are, in effect, decided adversely to appellant by the propositions above laid down. And as we are satisfied there is no error in respect to those questions, we affirm the decree of the probate court.

JESSE vs. CATER.

[ACTION ON INJUNCTION BOND—PLEA OF ARBITRATION AND AWARD.]

1. *Error without injury in overruling demurrer to several pleas of which one is good.*—Where a demurrer to several pleas, each going to the whole declaration, is overruled, and the plaintiff declines to reply, the judgment on the demurrer will not be reversed on error, if any one of the pleas is good, since the erroneous overruling of the demurrer to the others could not have prejudiced the plaintiff.
2. *Conclusiveness of judicial decisions.*—When a case is brought to the appellate court a second time, the opinion previously pronounced, even though its correctness may be doubted, as to the precise question then before the court, is obligatory; but, while yielding implicit obedience to the actual decision, the court is not necessarily bound to carry out literally the dicta pertaining to questions which were not then presented on the record.
3. *Submission to arbitration construed.*—Pending an injunction suit for the abatement of a livery-stable, the parties agreed to submit to arbitration the

matters in controversy between them, and the agreement contained a stipulation "that the award of the arbitrators, made in pursuance of this agreement, shall terminate and forever decide all matters of controversy, at law or in equity, in relation to the said livery-stable": *Held*, that the right of action at law on the injunction bond, though it might not be included in the subject-matter to be directly decided by the arbitrators, was nevertheless to be settled by the award; and that, consequently, after the award was made, an action at law could not be maintained on the injunction bond, unless the award was not binding.

4. *Plea averring arbitration and award.*—In an action on an injunction bond where the matters in controversy in the injunction suit were submitted to arbitration, and the arbitrators awarded that certain acts should be done by the parties concurrently, a plea setting up the submission and award must aver performance on the part of the pleader, or an offer to perform, or a good and legal excuse for the omission to do either.
5. *Award construed.*—In awarding an exchange of lots, the arbitrators directed that the parties "can and do make" to each other respectively "a fee-simple title": *Held*, that the conveyances were to be executed concurrently; that a "fee-simple title" meant a good title; that the award did not ascertain that the defendant then had the title to the lot which he was to convey, but that he could procure it; and that his failure to procure the title was a good and legal excuse for the plaintiff's failure to perform.
6. *Estoppel by submission and award.*—Where a submission to arbitration is made under an order of court, and the award entered up as the judgment of the court, a party is not thereby estopped from pleading any matter not necessarily within the scope of the award.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

This action was commenced in February, 1853, and was founded on an injunction bond, the condition of which, as alleged in the complaint, was, "that if the said Jemima M. Cater, or her sureties for her, or her or their heirs, executors, administrators, or assigns, shall pay to the plaintiff, his executors, administrators, or assigns, all costs, loss, or damages, that he may or shall sustain by the illegal, wrongful, or improper suing out of an injunction from the 19th chancery district, State of Alabama, by which said plaintiff was restrained from erecting a livery-stable in the town of Selma." The declaration alleged, that the condition of said bond was broken, in this: 1st, that said injunction was dissolved at the November term, 1852, of said chancery court, and the plaintiff's bill dismissed, and that great damage accrued to the plaintiff in consequence of said injunction and suit, which the

defendant has not paid; 2d, that said injunction was illegally sued out; 3d, that said injunction was wrongfully sued out; and, 4th, that said injunction was improperly sued out.

The defendants filed two special pleas, to each of which a demurrer was interposed, but overruled. The first plea was in these words:

"*Actio non*, because they say, that the said Jemima M. Cater, on the — day of —, filed her bill of complaint against the said William H. Jesse, in the chancery court at Cahaba, to enjoin and restrain him from the erection of a livery-stable on a certain lot in the city of Selma, and to abate the same as a nuisance; and while the said cause was pending and undetermined, the said Jemima M. Cater and William H. Jesse, at the December term, 1851, of said court, obtained from said court an order and decree in the following words:

<p>"Jemima M. Cater vs. William H. Jesse.</p>	}	<p>In the Chancery Court at Cahaba. It appearing to the satisfaction of the court, by the answer of the de- fendant, that he is, and always has been, willing to accept the complainant's proposition, as contained in her bill of com- plaint, in reference to an exchange of lots as therein stated; and the said parties being willing to adjust the question of nuisance, as raised by the bill, by arbitration, and petitioning the court for reference to arbitration: It is ordered, ad- judged, and decreed, that the complainant have leave to select two disinterested persons, in no wise connected with herself, or with the Presbyterian church, or with any other church, and that the defendant have leave to select two per- sons of like character, in no wise connected with any church or himself, to act as arbitrators of the matter aforesaid, and, in the event of disagreement, to select a fifth person as umpire; and that said arbitrators assemble on the 15th De- cember, inst., or on some day not later than the 20th, in Selma, and determine, according to equality and justice, what lot in the town of Selma, suitable for a livery-stable in said town, shall be exchanged for the lot of said Jesse, and that a fee-simple title can be made to said Jesse for the same. Upon this determination of said arbitrators, if a fee-simple title cannot (?) be made to said Jesse, and the same is not</p>
---	---	--

made by the next regular or special term of this court, and the other conditions of said arbitration are not at that time complied with, the complainant's bill shall be dismissed, with costs against her; and the question of costs in this court, if said arbitration is complied with by both parties, shall be for the further decision of this court. It is further ordered and decreed, before the complainant shall be bound as above stated in relation to the title of the lot to be given in exchange, that the said William H. Jesse shall make to the said Jemima M. Cater, or to such person or persons as she may order and direct, a fee-simple title to the lot on which said livery-stable is situate; hereby binding them both equally to make or exchange titles in fee simple contemporaneously; the question of title, if any controversy arise in relation thereto, to be determined by Geo. W. Gayle and Wm. M. Murphy, who, if they disagree, shall call in a third person, who shall be a respectable lawyer, and his decision shall determine the question in dispute. In the event that the said William H. Jesse shall fail to attend to and comply with this arbitration and agreement, then the said livery-stable shall be abated as a nuisance, and such is to be made the order of the court, and the said Jesse perpetually enjoined from the erection of said livery-stable, or of any other on said lot. And it is further agreed, that the award of the arbitrators, made in pursuance of this agreement, shall terminate and forever decide all matters of controversy, at law or in equity, in relation to the said livery-stable; and that the award of the arbitrators shall be returned to said court, and made the judgment and decree of said court."

The plea then avers, that the arbitrators appointed under said order and decree, and in pursuance thereof, on the 17th December, 1851, made their award in the premises, which is set out in the plea, and the material portion of which is as follows: "The undersigned arbitrators therefore make the following award: 1. That the said Jemima M. Cater can and do make a fee-simple title to the said Wm. H. Jesse, to the lot offered by her in exchange as aforesaid, as upon the consideration of \$350; and that the said Wm. H. Jesse can and do make to the said Cater, or to such person or persons as she may designate, a fee-simple title to the lot of him, the

said Jesse, as described in complainant's bill, and herein particularly designated, upon the consideration of \$1200. 2. That the said Jemima M. Cater, upon receiving a fee-simple title from said Jesse for said lot, shall pay him in hand, as a just and equitable difference between the value of said lots and improvements, the sum of \$850; and that the said parties severally assent to this award, by themselves or counsel. Given under our hands and seals," &c.

The plea then proceeds,—“Which said award was afterwards, to-wit,” &c., “reported to said chancery court, and by said court was received, confirmed, and recorded; all of which more fully and at large appears on the records of said court, reference being thereunto had. And said defendants aver, that at the time of making said award, and at the time of the commencement of this suit, and since those times respectively, the said Wm. H. Jesse did not have or hold a title in fee-simple, or any other lawful title, to the said lot upon which said livery-stable was to be erected, and which is the identical lot mentioned in said award; nor has the said Jesse ever produced and shown, tendered or exhibited such titles to said lot as were required of him; nor has he ever offered or tendered the same to the said Jemima M. Cater, or to any person or persons for her; and these defendants in fact say, that the said Jesse, before and at the time of the said award, as well as before and at the time of the commencement of this suit, and since those times, never held or owned the lawful right and title of and to the said lot, and could not now, nor at any other time before or after the commencement of this suit, have made and delivered good and sufficient titles to the said lot; and these defendants in fact further say, that the lawful estate and title of and to the said lot, now, before, and at the time of making the said award, and before and at the time of the commencement of this suit, (is and was) in another and different person. All of which the said defendants are ready to verify.”

It is unnecessary to notice the second plea.

The overruling of the demurrers to the pleas is now assigned as error.

GEO. W. GAYLE, for the appellant, contended, that the

first plea was bad under the previous decision of the case, in 25 Ala. 351, and aside from that decision, because the question of title was submitted to the arbitrators, and by them decided, and the plea did not aver that they had decided that Jesse had no title.

WM. M. MURPHY, *contra*, insisted, 1st, that the previous decision of this court did not cover the question now presented; 2d, that the acts to be performed by the respective parties were mutual and dependent, and therefore plaintiff should have replied performance on his part, or a readiness to perform; and, 3d, that if not mutual and dependent, they were at least concurrent, and the defendant might plead non-performance on the part of the plaintiff in bar of the action. He cited 2 Bacon's Abr. 613; 1 Stra. 569; Douglass, 685; 4 Term R. 761; Green v. Linton, 7 Porter, 133; Jones v. Sommerville, 1 *ib.* 437; McLendon v. Godfrey, 3 Ala. 181; Ready v. Mayor, 6 *ib.* 328.

WALKER, J.—The appellant, who was the plaintiff below, demurred separately to the defendants' two pleas. The demurrers were overruled; and, the plaintiff declining to further plead, a judgment was rendered for the defendant. If either of the pleas, the demurrers to which were overruled, averred facts constituting a defense to the action, the judgment of the court below must be affirmed. Both the pleas go to the entire action; and therefore the plaintiff has not been prejudiced by the erroneous overruling the demurrer to one of the pleas, if the other was good.—See the cases of Firemen's Ins. Co. v. Cochran & Co., 27 Ala. 228; and The State v. Brantley, 27 Ala. 44.

We proceed to consider the sufficiency of the first of defendants' two pleas; and if the conclusion is attained, that it interposed a valid defense to the entire action, the judgment of the court below may be affirmed, without an examination of the second plea, as its deficiency would not change the result.

This case has once before been in this court.—See 25 Ala. 351. The question was then, as it is now, upon the sufficiency of a plea. The plea then passed upon by this court set up

an award, without any additional averment. This court *adjudged* that plea, resting the defense upon the award alone, as defective. Furthermore, the learned judge who delivered the opinion indicates, in *dicta*, what additional matter would be requisite to supply the deficiency of the plea. The opinion asserts, in effect, not only that the award *was* not of itself a defense to the suit, but that it *could* not be unless pleaded with an allegation of performance, or of an offer to perform, or at least of a readiness to perform, the duties imposed by the award upon the pleader. Although we might be disposed to doubt the correctness of the former decision of this court, it is obligatory upon us, so far as the question then before the court is concerned; but we are not necessarily bound to literally carry out the *dicta* pertaining to questions not before the court. To the decision of the court, as to the sufficiency of the plea then before it, we yield implicit obedience; but we are at liberty to look beyond the mere letter of the opinion as to the additional averment necessary to make out the defense, and to regard it as authority according to its spirit and intention. While the position is taken, in general terms, that performance, or an offer to perform, would be necessary to make the award available as a defense, we do not think it was intended to exclude the idea that there could be other facts which might have the same effect.—*Sibbald v. The United States*, 12 Peters, 488; 26 Ala. 647; 25 *ib.* 199; 23 *ib.* 609; 15 *ib.* 232; 2 *ib.* 522; 1 Porter, 313; 4 S. & P. 59.

We think that the averment of a sufficient legal excuse for the omission to perform, or to offer to perform, the obligations imposed by the award upon the defendant, would have had the same effect, when pleaded in connection with the award, as would the averment of performance, or of an offer to perform; and we think this court would have so decided, in its former opinion, if the question had been presented.

The submission to arbitration, which is set forth in the plea, contains an agreement, that the award of the arbitrators, made in pursuance to the contract of submission, "should *terminate* and forever *decide* all matters of controversy, *at law* or in *equity*," in relation to the livery-stable therein named. The agreement is sufficiently comprehensive to include, as one of the matters to be settled by the award, the right of

action *at law* upon the injunction bond. It may be, that that right of action was not embraced within the subject-matter to be directly passed upon by the arbitrators, and was collateral to it; nevertheless the award was to have the effect of settling it. It follows, that the plaintiff (Jesse) could have maintained no action upon the injunction bond, after the award in pursuance to the contract of reference, unless that award was not binding upon him. Following the previous decision of this court, we hold, that the award, standing by itself, would not be effectual against Jesse. We also follow that opinion, and say, that performance, or an offer to perform by Mrs. Cater, would have made the award operative against Jesse; and that either of those facts, when pleaded in connection with the award, would have made a good defense to this action. Meeting the question presented by the plea now before us, we also decide that the averment of a good and lawful excuse for the omission to perform, or to offer to perform, on Mrs. Cater's part, would be equivalent, in its effect, to an averment of either of those omitted acts.

The matter alleged in the plea now under consideration, which was not in the plea heretofore passed upon, is, that no lawful title to the lot, to be exchanged by Jesse with Mrs. Cater, was in Jesse, and that it was in another person, at the time of making the award, and has since so remained. This, we think, constitutes a sufficient and legal excuse for the omission of performance, or of an offer of performance by Mrs. Cater. The duties imposed were to be simultaneously performed. The acts to be done were intended to be concurrent.—*Hay v. Brown*, 12 Wend. 592. The law would not require Mrs. Cater to go through the useless ceremonial of offering to comply on her part, when Jesse was totally unable to comply. It was Jesse's duty, when the award of the arbitrators was rendered, if he did not have a title to the lot, to procure it, and place himself in a condition to perform the duties imposed upon him. It was not Mrs. Cater's duty to pursue him with requests to perform that duty.—*Griggs v. Woodruff*, 14 Ala. 20; *Allen v. Green*, 19 Ala. 34.

A different decision would permit Jesse, after agreeing that the award should settle the matter of controversy, to avoid its effect, if he deemed it unfavorable to himself, by

forbearing to place himself in a condition to perform the obligations imposed. It would be to allow him to speculate upon the chances of an award favorable to him, and then avail himself of his own wrong as the means of rendering it inoperative against him.

The arbitrators, in making the award that a fee-simple title should be made, are not presumed to have intended the making of a deed, without regard to title. Mrs. Cater had a right, under the award, not merely to a conveyance, but to a good title.—*Hunter v. O'Neil*, 12 Ala. 36; *Judson v. Wass*, 11 Johns. 584; *Tucker v. Woods*, 12 *ib.* 190.

For the appellant it is contended, that the question whether Jesse had title to the lot was adjudicated by the arbitrators, and that Mrs. Cater is estopped from setting up the contrary. The judgment of the arbitrators is not that Jesse *has* title to the lot, but that he "*can and do*" make title to it. The language used in the award does not necessarily imply that the title was in Jesse at the time of the award, or that he *then* had the present ability to make title. A judgment can of itself only operate as an estoppel as to matters necessarily within its scope. The judgment of the arbitrators, which was confirmed by the court, is not inconsistent with the idea, that Jesse did not actually have title, but *could* make title at a future time, because he could procure it. The averment that Jesse was without title, was not necessarily in conflict with the decision of the arbitrators, and therefore Mrs. Cater was not estopped from pleading it.—*McCravy v. Remson*, 19 Ala. 433; *Chamberlain v. Gaillard*, 26 *ib.* 504; *Whittick v. Traun*, 25 *ib.* 317.

An application of the principles which are laid down in this opinion, sustains the defendant's first plea, and therefore the judgment of the circuit court is affirmed.

POLLARD *vs.* SCEARS' ADM'R.

[FINAL SETTLEMENT OF ADMINISTRATOR'S ACCOUNTS—APPEAL BY DISTRIBUTEE FROM ALLOWANCE OF CERTAIN CREDITS.]

1. *When administrator is bound to plead statute of limitations.*—An administrator is not bound to plead the statute of limitations, when he has personal assets sufficient to pay the debts; but a different rule prevails, where a resort to the realty is necessary to raise a fund for that purpose.
2. *What is sufficient presentation of claim.*—At a meeting between the administrator and several of the distributees of an estate, two of whom claimed to hold debts against the deceased, the account in reference to the transaction out of which the claims arose was stated in writing, with the assistance of the administrator, who then asked one of them, "if that item was all he claimed"; to which the latter replied, "that it was all they claimed": *Held*, that this was a sufficient presentation to avoid the statute of non-claim.

APPEAL from the Court of Probate of Greene.

On the final settlement by Lewis F. Leonard of his administration on the estate of Martha Scears, deceased, at the October term of said probate court, 1855, the following proceedings were had: "It appeared in evidence, that the heirs of the said estate were, Willis Pollard, Richard Pollard, Lewis F. Pollard, and the heirs of Austin Pollard, deceased, (namely, Austin Pollard, jr., Oscar Pollard, Osborne H. Pollard, and Martha W. Armstrong, wife of Thomas T. Armstrong,) who were children and grand-children by her first husband, and John and William Scears, children by her second husband; and that said Lewis F. Leonard was appointed her administrator on the 24th November, 1853. It further appeared in evidence, that one Samuel Scears departed this life, intestate, in 1835, leaving his widow, the said Martha Scears, and two infant children, the said John and William Scears; that Austin Pollard, sr., was appointed administrator of the estate of said Samuel Scears, and died in 1853, without having made a final settlement of his administration; that said Martha, John and William Scears continued to live on the plantation, and, after they became of

age, worked their hands and land together, as co-partners with said Martha, until about the year 1847; that said Martha received from the said Austin Pollard, administrator as aforesaid, on or about May 1, 1841, \$800 belonging to said estate, in and to which said John and William Scears were entitled to a share of one-third each; that with this money said Martha bought two negroes, taking the bills of sale and title to herself, and held them as such until her death in 1853; that said Martha, on or about January 1, 1846, sold the crop of cotton raised by them jointly in 1845, and received the proceeds, about \$600, which she invested in a negro boy, taking the title in her own name, and holding him as her property until her death; that the said Lewis F. Leonard, as her administrator, sold said slaves, and the proceeds of their sale is a part of the fund now to be divided."

"It further appeared that, in August, 1854, when Austin Pollard, jr., as administrator of his father, was about to make a final settlement of his administration on the estate of said Samuel Scears, said John and William Scears proposed to charge him with said \$800 received by said Martha as aforesaid; that Lewis F. Pollard then agreed with the parties, that if that claim was not brought into that settlement, he, as administrator of their mother, would admit that she had received said sum of money, that he knew she had received said \$600, and that, on a settlement of the co-partnership business of said Martha, John and William Scears, he would allow the same, if they would bring in or render an account of money used by or advanced to them; and that said administration was then settled, without charging said \$800. It further appeared in evidence, that the heirs of said Martha Scears, or some of them, met at the house of John Scears, in February, 1855, for the purpose of preparing for a settlement of said co-partnership business, and also a final settlement of her estate; that the said items then became the subject of conversation, and said Lewis F. Pollard (the administrator) then asked Austin Pollard to state the account hereto attached, which he then wrote down as directed, and called upon the said John and William Scears to present their accounts, in regard to their advancement and partnership claim, similar to the one which he prepared; that he

asked John, at the same time, if that item of \$800 and \$600 was all he claimed against said estate; and that John replied, they were all they claimed. The said John and William Scears, nor either of them, ever rendered any account of claims or advancements, as the said Pollard then proposed and afterwards requested, until the statement or settlement hereto attached was made by and between them on the 27th October, 1855. It further appeared in evidence, that the said Lewis F. Leonard, administrator as aforesaid, on the 27th October, 1855, for the purpose of making a final settlement of said estate, made the settlement with said John and William Scears which is hereto attached, based upon said settlement made between said Lewis F. and Austin Pollard as aforesaid; that he thereupon paid said John Scears \$250 12, and said William \$619 57, and took from each of them a receipt for the respective sums, and also a release for all liability against the estate of said Martha Scears for said co-partnership and other claims."

The two accounts above referred to are made exhibits to the bill of exceptions. The first is an account current (the account stated between Lewis F. and Austin Pollard) between Martha Scears and the said partnership, in which said Martha is charged with said sums of \$800 and \$600, and credited with the annual hire of the negroes; interest being computed on both sides of the account, and a balance struck against her of \$1397 66. The other exhibit is the statement of the accounts between said administrator and John and William Scears; in which the administrator charges himself with said sum of \$1397 66 and interest thereon, and charges John Scears with \$369 45 as the amount of his account and interest; and the aggregate of these two sums is divided equally between Martha, John and William Scears, being \$619 57 to each.

"The said Lewis F. Leonard, as administrator as aforesaid, then went into a final settlement of the estate of said Martha Scears, and, amongst other vouchers, presented and offered to the court for allowance the two receipts of said John and William Scears, for said sums of \$250 12 and \$619 57, taken from them as aforesaid. Thereupon said Austin Pollard, one of the heirs, objected to the allowance of said vouchers, and assigned as grounds of objection, 1st, that they were barred

by the statute of non-claim; 2d, that they were barred by the statute of limitations; and, 3d, that they were not correct or just claims." The court overruled these objections, and allowed the said vouchers; and to this decision the said Austin Pollard excepted.

The allowance of these vouchers is now assigned as error.

S. W. COCKRELL, for the appellant.

STONE, J.—An administrator, who has personal assets, in value sufficient to pay the debts of his intestate, is not bound to plead the statute of limitations.—Knight v. Godbolt, 7 Ala. 304; Hall, Weeks & Co. v. Darrington, 9 Ala. 502; *Ex parte* Perryman and Wife, 25 Ala. 79. When a resort to the realty is necessary, to raise a fund to pay the debts, a different rule, for an obvious reason, prevails.—Bond v. Smith, 2 Ala. 660. In this case, we are not informed that the real estate was called into requisition, and hence conclude that the debts were paid with the personalty, the primary fund for that purpose.

It was also objected, that the debts in question were barred by the statute of *non-claim*, and that their payment by the administrator was in his own wrong. We do not think this objection sustained by the facts. Before the expiration of eighteen months after the administrator qualified, the claims of the creditors, which he afterwards paid, were formally stated in writing, in the presence, and with the assistance of the administrator; the creditors both being present. To a question addressed by the administrator to one of the creditors, asking if that item, referring to the account, was all he claimed, he replied, it was all *they* claimed. The claim of each creditor grew out of one and the same transaction; and the presentation of one was the presentation of both demands. Surely, this was enough to inform the administrator of the nature and amount of the demand, and that the claimants looked to the administrator for payment. The presentation was sufficient.—Hallett & Walker v. Br. Bk. Mobile, 12 Ala. 193; Jones v. Lightfoot, 10 *ib.* 17; Jones v. Pharr, 3 *ib.* 283; Hunley v. Shuford, 11 *ib.* 203.

It was further objected to the allowance of said credits,

that they were not just demands against the intestate. If it were allowable, in the form in which the question is raised, to consider of the sufficiency of the proof on this point, we would answer, that the bill of exceptions contains the distinct statement, *as a fact*, that the intestate had received the two sums of money which created the liability; and that the said creditors were entitled each to one-third of each of said sums. But this question is not presented in such form as to authorize its revision here.

The judgment of the probate court is affirmed.

JACKSON vs. SHIPMAN.

[GARNISHMENT AGAINST ADMINISTRATOR ON JUDGMENT AGAINST DISTRIBUTE.]

1. *Who may make affidavit for garnishment.*—Under section 2520 of the Code, which allows a judgment creditor of a distributee to sue out process of garnishment against the administrator of the estate, the affidavit for the garnishment should be made by the real owner of the judgment, and not by the plaintiff of record.
2. *In whose name garnishment must be prosecuted.*—But, although the affidavit should be made by the real owner of the judgment, and although the garnishment is the institution of a suit, yet the process must be sued out, and the judgment on the answer taken, in the name of the plaintiff of record, and not in the name of the real owner of the judgment.
3. *What defenses garnishee may make.*—The garnishee cannot raise the question of the ownership of the original judgment, since he has no interest in that question. Conceding that he may show satisfaction of the original judgment, and that his statement of that fact, when not controverted or disproved, must be taken as true; yet his mere statement "that he is advised and believes" that the judgment has been satisfied, is not an averment that such fact exists.
4. *As to proof of original judgment.*—It is erroneous to render judgment against the garnishee, without proof of the original judgment; yet, where the judgment is correctly described in the garnishment, to which the garnishee made answer, and the judgment entry shows that the garnishee appeared in court, "and waived the objection that no judgment could be rendered because no execution could issue on the judgment,"—this is an admission of the existence of the original judgment, and dispenses with further proof of it.

Jackson v. Shipman.

5. *Judgment corrected and affirmed.*—Where the affidavit for the garnishment is made by the real owner of the judgment of which satisfaction is sought, and judgment is rendered in his name against the garnishee, while the affidavit and garnishment correctly describe the original judgment, the judgment will be corrected in the appellate court, at the costs of the appellant, and rendered in the name of the plaintiff in the original judgment.

APPEAL from the Circuit Court of Sumter.

Tried before the Hon. THOMAS A. WALKER.

The record in this case shows the following facts: On the 28th June, 1854, Temperance Shipman made affidavit, before the clerk of the circuit court of Sumter, "that a certain judgment, recovered in said court at its May term, 1844, for the sum of \$532, besides costs, wherein Hiram Jackson, administrator of Randall Jackson, deceased, is plaintiff, and Peter Jackson is defendant, belongs to, and is the property of this affiant; that said Peter is a distributee of the estate of Elizabeth Jackson, deceased; that Jacinth Jackson is the administrator of the estate of said Elizabeth, and as such, affiant believes, has assets to pay said judgment, or some portion thereof, out of the distributive share of said Peter; and affiant believes that process of garnishment against said Jacinth, as such administrator, is necessary to obtain satisfaction of said judgment."

On this affidavit a garnishment was issued against said Jacinth Jackson, which was duly executed on him; and at the return term of the summons, he appeared, and filed a written answer, in these words: "Jacinth Jackson, who has been summoned as garnishee to answer what he, as administrator of Elizabeth Jackson, deceased, is indebted to Peter Jackson, for answer says, that the estate of said Elizabeth Jackson has not yet been settled, but, when a settlement shall take place, there will be due to said Peter Jackson, as one of the distributees, the sum of about \$80; that said estate is not, and will not be, otherwise indebted to him; that respondent is not, and will not be, otherwise indebted to him, nor has respondent, as administrator or otherwise, any effects of his in his hands, nor does he know of any one who is indebted to him, or who has any effects belonging to him. Respondent further says, that he is advised and believes that the judgment, on which said garnishment was issued, was

fully settled and discharged before the issuance of said garnishment; and he therefore insists, that no judgment on this answer shall be rendered against him. Respondent further says, that he is advised and believes that the first execution on said judgment was issued and tested on the 3d day of June, 1844, at a time when no execution could be legally issued on said judgment; and for this reason, also, he insists that no judgment shall be rendered against him on this answer. Respondent further says, that he is advised that the affidavit, on which said garnishment was issued, is insufficient to authorize the issuance thereof; and for this reason he prays that said garnishment may be dismissed.

On this answer the court rendered the following judgment:

"Came the parties in this cause: Jacinth Jackson filed his answer as garnishee, in writing, and said written answer is made a part of the record. Thereupon, said garnishee waived the objections, that no judgment could be rendered because no execution could issue on the judgment, and that the estate of his intestate had not been settled, and moved the court to be discharged on his answer; but the court, on inspection of the affidavit and answer, overruled said motion. And the court thereupon considered, that the plaintiff recover of the garnishee the said sum of \$80 mentioned in his answer, and that said garnishee be allowed his mileage and attendance," &c.

The errors now assigned on this judgment are, 1st, "that the court erred in rendering judgment against the appellant on his answer"; and, 2d, "that the court erred in rendering judgment against the appellant on his answer, without proof of the judgment in favor of the appellee against Peter Jackson, or that the appellee was the owner."

TURNER REAVIS, for appellant, made these points:

1. A garnishment cannot be issued on a judgment, unless an execution can be issued on it; and therefore the affidavit ought to state that an execution could issue on it.—Code, § 2471. The statute does not, in terms, require this, nor does it require it to be stated that there is a judgment; but the statements of these facts are equally necessary. An execution cannot be issued on a judgment during the term of the

court at which it is rendered, without affidavit and leave of the court.—Code, §§ 2423–2426. Nor can an execution be issued on a judgment which the record shows to have been satisfied.—Thompson v. Wallace, 3 Ala. 132. Section 2471 of the Code was designed to put executions and garnishments on judgments on the same footing. If a garnishment may be issued on a judgment without affidavit that an execution can be issued on it, a garnishment may be issued on a judgment in term time, or on a satisfied judgment, when an execution cannot.

2. The affidavit is insufficient, also, because it was made, not by the plaintiff in the judgment, nor by his agent or attorney, but by a third person claiming to be the owner.

3. The answer not having been traversed, the statement therein that the judgment had been fully paid and discharged is to be taken as strictly true.—Robinson v. Rapelye, 2 Stew. 86. That this is a defense which the garnishee may make, see Thompson v. Wallace, 3 Ala. 132; Dew v. State Bank, 9 *ib.* 323.

4. It was erroneous to render judgment against the garnishee, without proof of the existence of the judgment mentioned in the affidavit, and that the appellee was the owner of it.—Blair v. Rhodes, 5 Ala. 648.

A. A. COLEMAN, *contra*, contended,—

1. That the affidavit was sufficient, and was made by the proper party.—Code, §§ 2129, 2540; 8 Ala. 574; 3 Stew. 335.

2. That, even if the garnishee may raise the question of the satisfaction of the original judgment, the answer in this case does not allege that fact, but only states the garnishee's belief.

3. That the answer admits the original judgment, and thereby dispenses with the necessity for further proof.

RICE, C. J.—By section 2520 of the Code, the amount of money which will be due to a distributee, on the final settlement of an estate, is subject to the process of garnishment, sued out against the administrator by the judgment creditor of the distributee; and if the administrator, in answer to such garnishment, admits assets to pay the amount claimed, or

some portion thereof, out of the distributive share of such judgment debtor, a judgment may be rendered against such garnishee, for the amount so admitted by him, before a final settlement of the estate. Without such admission, a judgment cannot be rendered against such garnishee, until a settlement of the estate.

The real owner of the judgment against such distributee is his judgment creditor, although the judgment may have been rendered in favor of another person as the plaintiff of record; and such real owner, being the judgment creditor, is entitled under section 2471 of the Code, upon making the affidavit therein prescribed, to sue out such garnishment. But in such case, he cannot sue it out, or take judgment thereon, in his own name; for, although such proceeding by garnishment is the institution of a suit, yet such suit is consequential to the judgment in the principal case, is designed as a remedy for its collection, and must be commenced and prosecuted in the name of the plaintiff in that judgment, no matter who may be its real owner.—Blair v. Rhodes, 5 Ala. 648.

When the garnishment suit is thus commenced and prosecuted, the garnishee cannot raise the question as to the ownership of the judgment in the principal case. He has no interest in such a question. The protection afforded to him by such a proceeding will not be destroyed, nor varied, by the mere fact that the judgment in the principal case does not belong to the plaintiff in whose name it was rendered, but to a third person.

Conceding that the garnishee may show that the judgment in the principal case has been satisfied, and that a statement of such satisfaction in his answer is to be taken as true, when not controverted or disproved; yet these concessions are unavailing to the garnishee in the present case, because there is no evidence of the satisfaction of the judgment under which the garnishment was sued out, and no statement in his answer that said judgment has been satisfied. The statement in the answer is, "that he is *advised and believes*" that said judgment has been satisfied. It is clear, that an averment "that he is *advised and believes*" that a fact exists, is not an averment that such fact does exist. If issue were taken on such averment, the issue would be, not as to the existence

or non-existence of the fact, but as to the existence or non-existence of such *advice and belief* on his part that the fact did exist.

We concede that it would have been erroneous to render judgment against the garnishee, without proof of the judgment mentioned in the affidavit.—Blair v. Rhodes, *supra*. But, as that judgment is well described in the garnishment, to which the garnishee made his answer, and as the judgment entry against the garnishee shows that he appeared in court, and “waived the objection that no judgment could be rendered *because no execution could issue on the judgment*,” we hold, that his admission, contained in this waiver and in his answer, is an admission of the existence of “the judgment” described in the garnishment, and is sufficient proof of its existence as against him in this proceeding.

It appears, also, that he waived the objection that the estate of his intestate had not been settled. And the only error we discover in the record is, that the judgment against him is not rendered in favor of the plaintiff in the judgment described in the affidavit and garnishment, but in favor of Temperance Shipman, who made the affidavit for suing out garnishment, and therein swore that she was the owner of that judgment. But this error is amendable; and inasmuch as the affidavit and garnishment both correctly describe the judgment, and thus furnish the means of making the amendment, we shall allow the judgment to be here amended, so as to show that it is a judgment against the garnishee, in favor of the plaintiff in the judgment in the principal case, and not in favor of Temperance Shipman. This amendment being made, the judgment must be affirmed, at the costs of the appellant.—Smith v. Redus, 9 Ala. 99; Collins v. Hyslop, 11 Ala. 508; Hood v. Br. Bk. at Mobile, 9 Ala. 335.

TRAVIS vs. MORRISON AND WIFE.

[PETITION BY ADMINISTRATOR FOR DIVISION OF SLAVES—CONSTRUCTION OF WILL.]

1. *Admissibility of parol evidence in construing will.*—In construing a will, it is permissible to look at the condition of the testator's family.
2. *Bequests construed, and held contingent.*—Testator directed his executors to keep together the entire estate; to cultivate the plantation with the slaves, and to apply the proceeds of the crops to the support of his family and the education of his children, and gave them power to sell property, and to manage the estate as they thought would be most conducive to the interests of the estate. The will contained, in addition to a specific bequest of three slaves to one daughter, the following clauses: "It is my further will and desire, that in the event of the marriage of my wife, or of either of my daughters, or of the child with which my wife is now pregnant, or of either of my children arriving at the age of twenty-one years, then my said executors shall have a division of all my property, both real and personal, and of whatever kind it may consist, and assign and give to my said wife, or my said children, when they shall marry or arrive at age as aforesaid, a child's part of said estate, which I give to them and their heirs forever." "In explanation of the foregoing bequest as to my plantation, it is my will and desire, that in the event of my wife's marriage, or of the marriage of any one of my children, or of any one of them arriving at age as aforesaid, that my property be then equally divided among them, giving each one, as before stated, a child's part of the same, and that the plantation be still managed and kept up by my said executors, for the benefit of my other children." The testator's family consisted of his wife and two daughters, one of whom was born of a former marriage. *Held*, that the legacies were contingent, and that therefore only those legatees who were living at the happening of the contingency, on which the division was to take place, were entitled to share in the estate.

APPEAL from the Court of Probate of Sumter.

The will of Enoch Travis, which was admitted to probate in Sumter county, in April, 1841, contained the following provisions:

"In the first place, it is my will and desire, that my plantation in Sumter county whereon I now reside, containing about eight hundred and ninety-seven acres, and all of my negroes on said plantation, consisting of about thirty-five in number, with all of my stock, consisting of horses, cattle, hogs, sheep, oxen, and all of the household furniture and farming

utensils of every kind and description, be managed and controlled, kept up and continued in cultivation and good order, by my executors, to be hereafter nominated and appointed; and from the proceeds of the crops, and the profits and increase of the said plantation, negroes, &c., it is my will and desire, that my family be comfortably supported, and my children decently educated; and the more fully to carry into effect these my wishes, I give my executors full power and authority to manage the same as they think best calculated to advance the interest of the estate, and from time to time to sell such property, and to make additions to the same, as they, in their opinion, may deem most advantageous.

"It is my further will and desire, that, in the event of the marriage of my wife, Harriet E., or of either of my daughters, or of the child with which my wife is now pregnant, or upon either of my said children arriving at the age of twenty-one years, then my said executors shall have a division of all my property, both real and personal, and of whatever kind it may consist, and assign and give to my said wife, or my said children when they shall marry or arrive at age aforesaid, a child's part of my said estate, which I give to them and their heirs forever.

"Is is my further will and desire, that the other real estate I own," [which is here particularly described as consisting of an undivided half of a quarter-section of land lying in Kemper county, Mississippi, a tract of eighty acres lying in Tuscaloosa county, and a city lot in Mobile,] "be all kept, managed, improved, rented or sold by my said executors, as they, in the exercise of sound discretion, may think most conducive to the interest of my estate; hereby giving and clothing my said executors with full powers to manage or sell the same, as if the property was their own.

"In explanation of the foregoing bequest as to my plantation, it is my will and desire, that in the event of my wife's marriage, or of the marriage of any one of my children, or of any one of them arriving at age as aforesaid, that my property be then equally divided among them, giving each one, as before stated, a child's part of the same, and that the plantation be still managed and kept up for the benefit of my other children,

"It is my will and desire, that of the negroes now in my possession, that Harriet, about eighteen years of age, Fanny, about ten years of age, and the child of Harriet, be not included in the foregoing bequests; but the said negroes, with all of their increase, are hereby given and bequeathed to my daughter, Mildred T. G. Travis, to her and her heirs forever.

"It is my further will and desire, that my brother, Amos Travis, in consideration of the trouble and labor and attention he must bestow upon the management of my property, and the execution of this my will and testament, be allowed the sum of \$1,600; the said amount to be credited, in equal proportions, upon three notes of his which I now hold, falling due the first of January, 1841, '42, and '43.

"I do hereby nominate and appoint my brothers, Seaborn Travis and Amos Travis, executors of this my last will and testament," &c.

In February, 1854, Amos Travis, the executor, filed his petition in said probate court, alleging that said Mildred, one of the children named in the will, had intermarried with one William Morrison, and was therefore entitled under the will to her share in the said estate, and that it was not necessary to sell any of the negroes for the payment of debts; and praying the appointment of commissioners to make a division of the slaves under the will. The commissioners were appointed, and made their report to the ensuing March term of said court, allotting one half of the slaves to the said Mildred; and their report was confirmed by the court.

The transcript filed in this court being defective, there was an agreement of record, that it should be so amended as to show the following additional facts: "That the will of said testator was made a part of the application for the order of distribution; that the application stated, and it was proved to the court, that said Mildred was a child of the testator by a former marriage, and was married before arriving at the age of twenty-one years; that Fanny is a child of the testator by the wife named in the will, is under age, and has never been married; that Fanny and Mildred are the only legatees named in the will who are living; that the testator's wife named in the will died without marrying again, and before the marriage of Mildred, and before either of the children

arrived at the age of twenty-one years; that the child, with which the testator's wife was pregnant, was born, but died before arriving at the age of twenty-one years, without ever having married, and before the marriage of Mildred; that both the wife and child died, after the death of the testator, in 1843; that Amos Travis, as guardian of said Fanny, excepted to the writ to the commissioners, to their report, by which one-half of the slaves were given to said Morrison and wife, and to the decree made in the case."

The decree of division is now assigned as error.

J. R. METCALFE, for the appellant, contended that the bequests were vested legacies, and cited the following cases: *McLemore v. McLemore*, 8 Ala. 690; *McLeod v. McDonnell*, 6 *ib.* 236; *Savage v. Benham*, 17 *ib.* 127; *Guyther v. Taylor*, 3 Ired. Eq. 323; *Shattuck v. Stedman*, 2 Pick. 468; 4 Kent's Com. 202, 206; *Roper on Legacies*, vol. 1, p. 377; *Goodtitle v. Whitby*, 1 Burr. 228; *Mansfield v. Dugard*, 1 Eq. Ab. 195; *Edwards v. Hammond*, 3 Lev. 132; *Hunt v. Moore*, 14 East, 601; *Hughes v. Hughes*, 12 B. Monroe, 119; *Wade v. Grimes*, 7 How. Miss. 425; *Scott v. James*, 3 *ib.* 307; *Taylor v. Taylor*, 4 Hen. & M. 411; *Roberts v. Baskins*, 4 Dana, 573; *Arnold v. Arnold*, 11 B. Monroe, 89; *Reed v. Buckley*, 5 Watts & Serg. 517; 9 Vesey, 225; *Furness v. Fox*, 1 Cushing's R. 134.

TURNER REAVIS, *contra*, cited the following authorities: *Anderson v. Felton*, 1 Iredell's Eq. 55; *Seabrook v. Seabrook*, 1 McMullen's Eq. 201; *Seibert's Appeal*, 13 Penn. State R. 501; *Chevaux v. Aislalie*, 13 Sim. 71; *Butcher v. Leach*, 5 Beav. 392; *Farmer v. Francis*, 2 Sim. & Stu. 505; *Hanson v. Graham*, 3 Vesey, 363; *Taylor v. Bacon*, 8 Sim. 100; *Bentinek v. Portland*, 4 L. J. Ch. 13; 2 Chitty's Equity Digest, 1125, §§ 7, 8, 10; *ib.* 1126, § 2; *ib.* 1127, § 2; *ib.* 1129, § 5.

WALKER, J.—The single question in this case is, whether the bequests to the testator's wife and children were vested or contingent interests.

The law inclines to regard legacies as vested, rather than contingent, because it is presumed that the testator had in view the interests of the legatee who is the object of his

bounty.—Shattuck v. Stedman, 2 Pick. 468; Savage v. Benham, 17 Ala. 127; Farley v. Gilmer, 12 *ib.* 143. This rule of construction was invoked by the counsel for the appellant. It was also insisted, on the same side, that a devise of land to several, to be divided at a particular time, is regarded by the law as a vested estate; and that, although the rule may be different as to legacies, that mode of construction peculiar to devises must be adopted, where real and personal estate are bequeathed together, and are clearly designed by the testator to go together.

Conceding to the appellant the benefit of those rules, we are nevertheless of the opinion, that the legacies created by the will in this case must be regarded as contingent. The law does not favor the vesting of legacies, contrary to the testator's intention, as inferred from an examination of the entire will. The great object of the court, in reference to this, as well as other questions involving the construction of wills, is to ascertain the testator's real intention. This rule, which inclines to regard legacies as vested, can have no application, where, upon a view of the entire will, the testator's intention to create contingent legacies is clear. It is where the intention is obscure and doubtful, that the rule applies; and the adoption of the rule has its origin in the idea that the court will better conform to the testator's intention by regarding the legacies in the light most favorable to the objects of his bounty.

We do not regard the other rule of construction invoked for appellant, as applicable to this case. The legacies in the clause of the will under consideration are not bequests *in presenti*, to be divided at a future time. The entire will, taken together, and the words of the particular clause, indicate an intention on the part of the testator that the time appointed for the division should be of the substance of the gift, and that the legacies should not vest until some one of the contingencies set forth in the will should occur.

The testator leaves a widow and two infant daughters. To provide equally for each one of these three persons, and for a posthumous child, the birth of which is anticipated in the will, was the intention of the clause in controversy. The maintenance of the family, and the education of the children, are

provided for, until the contingency should occur upon which the division was to be made. Up to the time of division, a perfect equality of participation in the enjoyment of the property is secured to each one. The marriage of any one of the legatees, or the attainment of majority by any one of the children, was the contingency upon which the division was to be made. Until the occurrence of the contingency upon which the division was to be made, neither one of the legatees could have lawful descendants not provided for in the will; because, upon the marriage of either one of them, the executor is directed to give each one a child's part. Therefore, it could not result from regarding the legacies as contingent, that the children of any one of the legatees would be deprived of participation in the testator's estate. In this respect, this case differs from *McLemore v. McLemore*, 8 Ala., *McLeod v. McDonnell*, 6 Ala., and *Savage v. Benham*, 17 Ala., in which legacies were held to be vested.

The contingencies in this will are carefully so arranged, that no injustice could result, either to the legatees or their descendants, by a postponement of the legacies until some one of those contingencies should occur. The testator proceeded, in the construction of his will, upon the supposition, that the widow should live with his children upon his plantation, receive from it a maintenance, and preserve the family relation, until she should find new interests and other engagements in a second marriage. Neither the widow nor the children would need the legacy until it would vest. The intention was, so to prescribe future contingencies, upon which the property was to be divided and the legacies to vest, as to secure perfect equality among the objects of the testator's bounty, upon the occurrence of any of them, and yet to impose no hardships upon any person connected with him.

"*In the event of*" the marriage of any of the legatees, or the attainment of majority by any of the infants, it is made the executor's duty to divide the property equally, and assign and give to each one a *a child's part*, "which" the testator adds, "I give to them and their heirs forever." Again, in a clause, the professed object of which is explanation, it is directed that, in the event of the marriage of the wife, or of the marriage or

attainment of majority of any of the children, the "property shall be *then equally* divided among them, *giving* each one, as before stated, a *child's part of the same*." There are here no words of gift *at the present time* to the legatees. The plain meaning is, that the legatees are to take upon the contingency. The words, "which I give to them and their heirs forever," must be construed in reference to the rest of the will, and must be understood to impart nothing more than an expression of the testator's wish that the legatees should take the shares assigned them respectively after the division. Such a construction harmonizes the entire sentence, and makes the words "which I give" consist with the direction that the executor shall "give and assign." There is no gift, except as connected with the contingency upon which the division is made.

It is permissible, in construing the will, to look at the condition of the testator's family.—*McLeod v. McDonnel*, 6 Ala. Looking at that, it is perceived, and must have been foreseen by the testator, that upon the death of the wife, from whom the child of the former marriage could not inherit, or upon the death of one of the children of the last marriage, who would inherit from each other to the exclusion of the half-blood, the executor could not give and assign to each one a child's part, if the legacies were vested. If the legacies be deemed contingent, there is no obstacle in the way of an equal division upon any of the contingencies.

The testator gives in the same will, by plain and unambiguous language, a vested legacy to the child of his first marriage. It is thus shown that he knew how to create a vested legacy; and it would be fair to infer, that, if it had been his intention to make the other legacies vested interests, he would have employed language equally clear and intelligible. *Anderson v. Felton*, 1 Iredell's Eq. 59.

Our conclusion is, that the legacies, to be given and assigned by the executor in the event of the marriage or attainment of majority of any of the legatees, are contingent; and that those of the legatees who were alive at the time when some one of them married or arrived at majority, take in equal parts the entire bequest mentioned in the clauses under consideration. We attain this conclusion not merely by refer-

ence to any particular words contained in the will, but upon a view of the entire instrument. We do not think any of the previous decisions of this court are in conflict with this decision.

The authorities pertaining to the questions decided in this opinion, will be found collected on the briefs of counsel.

The judgment of the court below is affirmed, at the cost of the appellant.

KIRKMAN, ABERNATHY & HANNA vs. BENHAM.

[BILL IN EQUITY TO ENFORCE CONSTRUCTIVE TRUST.]

1. *Bill of exchange drawn by executor no claim against estate.*—A bill of exchange drawn by G. S., with the addition of the words "executor of S. S.", is the personal contract of the drawer, and does not bind the estate; and an accommodation acceptor, who pays the bill, has no claim against the estate.
2. *Confusion of debts by executor.*—If an executor, in taking a confession of judgment from a debtor to whom he has loaned the money of the estate, includes a debt due to himself individually, or to another person, this unauthorized blending of the debts creates no right against the estate; and if a succeeding representative of the estate collects a portion of the judgment, not exceeding the amount of the debt due to the estate, the other creditor, whose debt was included in the judgment, is not entitled to share in it.
3. *Constructive trust does not arise from unauthorized confusion of debts.*—An executor, while keeping his testator's estate together under the directions of the will, drew his bill of exchange, in favor of one D., which was accepted for accommodation by K. A. & H., and then discounted in bank. The executor applied a small part of the proceeds to the discharge of debts of the estate, and loaned the residue to said D., as money belonging to the estate. D. afterwards confessed judgment, in favor of the executor, for the amount of his indebtedness to the estate, including this sum, and became insolvent. The executor also became insolvent, and removed from the State. A succeeding administrator collected a portion of the judgment, not exceeding the amount of the debt due the estate; and the acceptors, after paying the bill, filed their bill in equity against him, claiming the right to share in the sum collected. *Held*, that the bill contained no equity.

APPEAL from the Chancery Court of Lauderdale.

Heard before the Hon. A. J. WALKER.

This bill was filed by the appellants, late partners, against Vincent M. Benham, as administrator *de bonis non* of Samuel Savage, deceased; and its material allegations were as follows: That on the 29th September, 1841, complainants, who were commission merchants in the city of New Orleans, accepted for one Geo. M. Savage his bill of exchange, of that date, for \$2,300, at eight months, in favor of one Hervey Dillahunt, and endorsed by said Dillahunt and one Thomas U. Lassiter; that said bill purported to be drawn by said Geo. M. Savage "as executor of Samuel Savage, deceased, of whose estate he was then, and had been for several years, the executor"; that complainants, when they accepted said bill, had no funds in their hands belonging to said Geo. M. Savage, either individually or as executor of Samuel Savage, nor have they since had any funds applicable to its payment; that said bill was sold by said Geo. M. Savage to the Huntsville Bank, on the 30th September, 1841, for \$2,195 35, and was afterwards protested for non-payment; that said Huntsville Bank afterwards brought suit on said bill, against said Geo. M. Savage, Dillahunt and Lassiter, and recovered judgment against the two former, (Lassiter not being served with process,) on the 22d August, 1842, for \$2,454 86, besides costs; that execution was issued on this judgment, on the 24th September, 1842, and was duly returned "no property found"; that complainants afterwards paid and satisfied said bill; that Dillahunt and Lassiter, before the payment of said bill by complainants, became, and still are, insolvent.

The bill further alleged, that said Geo. M. Savage was a son of said Samuel Savage, who died, in said county of Lauderdale, of which he was a resident citizen at the time of his death, in 1837; that the will of said Samuel Savage was duly admitted to probate, and letters testamentary granted to said Geo. M., who qualified and gave bond as executor; that said Samuel owned a large plantation, with many negroes, at the time of his death, and by his will directed that his estate should be kept together for several years, and charged with the support, education, &c., of his two youngest sons, Samuel G. and John T.; that said Geo. M. Savage, out of the proceeds of said bill of exchange, applied \$20 to the payment of a debt for necessities created by said Samuel G.,

and \$11 99 to the payment of a similar debt for said John T., and loaned \$2,000 thereof to said Dillahunt, as so much money belonging to the estate of Samuel Savage; that he had, for several years prior to that time, been lending the money of his father's estate to said Dillahunt, who was his brother-in-law; "that said Dillahunt, on the 25th July, 1842, secured the payment of all that he owed said Geo. M. as executor of his father, which, with interest up to that time, amounted to \$7,773 86, by confessing a judgment for that sum in his favor, as such executor"; that the \$2,000 realized from the proceeds of said bill, with \$129 24 interest thereon, for which said estate never paid any consideration, were included in this judgment; that said Geo. M. Savage, in November, 1842, absconded from the State, being at the time insolvent; that Vincent M. Benham, the defendant, was afterwards appointed administrator *de bonis non* of said Samuel Savage's estate, and in August, 1843, collected on said judgment confessed by Dillahunt the sum of \$5,697; and that the balance of said judgment is still uncollected, and said Dillahunt is still insolvent.

The prayer of the bill is, that the defendant, as administrator of said Samuel Savage, may be made to account with complainant, out of the money collected on said judgment, for the proceeds of said bill of exchange, less its proportionate part of the uncollected balance; and the prayer for general relief is added.

The decision of the case here is made to turn on the equity of the bill, and it is therefore unnecessary to notice the other facts of the case disclosed by the answer and evidence.

On final hearing, on pleadings and proof, the chancellor dismissed the bill; and his decree is now assigned as error.

L. P. & R. W. WALKER, for the appellants:

1. Does the defendant occupy the relation of trustee *in invitum* for the complainants? The confessed judgment is indivisible; and if a part of its consideration moved from the complainants, they are, in equity, entitled to participate in its benefits. The judgment was confessed, in part, to secure \$2,129 raised upon the complainants' acceptance, which they afterwards paid, and which was loaned by G. M. Savage, as

executor, to Dillahunt. The estate of Savage was not entitled to this \$2,129, for it had paid nothing for it. If the complainants, after the confession of judgment, but before its payment, had paid their acceptance to the Bank, would not a court of chancery, on their application, have restrained the defendant from the collection of so much of the judgment? Is the case altered, in principle, by an after payment? Is the money now less theirs, or more the defendant's, than it would then have been? If it is not the money of complainants, whose is it?

The maxim, *qui prior est in tempore, potior est in jure*, does not apply. There was no race of diligence. When the judgment was confessed, complainants were not creditors; when it was paid, they were not creditors. Neither at the time of confession, nor at the time of payment, were they entitled to the one or the other. They were not the creditors of Geo. M. Savage, of the estate of Samuel Savage, or of Dillahunt. Their rights were *in fieri*, and contingent. But, on the payment of the bill, the question instantly arises, Who is entitled to the \$2,129?—the appellants, whose acceptance procured it, and who have paid for it; or the estate of Samuel Savage, which received it without consideration, and loaned it without acknowledgment? Benham's predecessor, in taking the confession of judgment, assumed to act for whosoever was entitled to the \$2,129, by including it in the judgment; and it does not now lie in the defendant's mouth to repudiate the trust, by alleging that there is no community of interest between the complainants and the defendant in the judgment. Having received money upon a judgment confessed at his instance, to a part of which, as between himself and the complainants, he is not entitled, constitutes an equity binding on his conscience, which this court will constrain.

The fact that the whole judgment was not collected, does not at all weaken the principle contended for. Whenever complainants paid their acceptance of the bill, of exchange, they became entitled, as against the estate of Savage, to all the benefits resulting from the confessed judgment, in which was included the \$2,129. No part of this sum belonged to the estate of Savage—it was all complainants'; and the question now is, whether any part of that sum was received by

the defendant. The judgment was a unit, and embraced as fully this sum as the balance of \$5,050. If the defendant received any portion of that sum, did he not necessarily receive it as well for complainants as for the estate? Can there be a superior equity in an indivisible title, having a common source and a contemporaneous origin? Benham could not collect for himself, without collecting for the complainants. The trust which we seek to enforce, had its origin when the judgment was confessed; and whenever any portion of that judgment was collected, the trust was in part performed. By accepting the confession of judgment, the defendant is estopped from seeking to distinguish between the constituents of the judgment. He cannot now be heard to say, 'What I have collected is my part of the judgment, and what remains uncollected is yours.' Dillahunty himself, in the confession of judgment, had refused to discriminate in favor of either claim, but placed them all on precisely the same footing. The right of all persons to discriminate ceased with the confession of judgment; and whatever was accomplished under the judgment, and in execution thereof, was a common benefit to all those who had rights under it.

2. When complainants paid the bill, they were entitled to be subrogated to all the rights of Geo. M. Savage in the judgment. Concede that the \$2,129 was due to him individually, and not as executor; still he had the right, when any portion of it was collected, to make a *pro rata* application of the sum received to his individual claim; and to this right complainants were substituted, whenever, by discharging their acceptance, they became his creditors. His removal from the administration, and Benham's appointment, do not alter the case. If he had paid the bill, he could have compelled Benham to account; and this right, upon his failure and complainants' performance, enures to their benefit by subrogation.

JOHN A. NOOE, *contra*: The only question in the case is, whether the defendant, as administrator of Samuel Savage, has any money in his hands, collected on the confessed judgment, to which the complainants have a better right in equity than the estate of said Savage has. The judgment was con-

fessed in favor of Savage's estate. Dillahuntz certainly owed the estate as much money as was collected on the judgment, while he did not owe the complainants anything. George M. Savage was their debtor; and they had no claim, at law or in equity, upon Dillahuntz, and no rights accrued to them in the confessed judgment.

STONE, J.—The bill of exchange mentioned in the pleadings, although signed as drawer by George M. Savage, styling himself "*executor of Samuel Savage*," is the personal contract of Geo. M. Savage, and does not bind the estate he represented. Kirkman, Abernathy & Hanna were accommodation acceptors, and, as such, have a right to be reimbursed by Geo. M. Savage, the drawer. This, however, gives them no claim against the estate of Samuel Savage.—Johnson v. Gaines, 8 Ala. 791; Willis v. Willis, 9 Ala. 330; Jones v. Dawson, 19 Ala. 672.

The money raised on this bill of exchange was used by Dillahuntz, with the consent of Geo. M. Savage; and both Dillahuntz and Geo. M. Savage are insolvent. The gravamen of the bill, as we understand it, is, that Geo. M. Savage, after he had, without authority, lent to Dillahuntz moneys of the estate of Samuel Savage, took from the said Dillahuntz his confession of judgment for said moneys, and also embraced in the judgment the moneys raised on said bill of exchange. This confession of judgment was to "Geo. M. Savage, executor of Samuel Savage, deceased." Benham, the administrator *de bonis non*, has collected a part of said confessed judgment, but there still remains an unpaid balance, greater in amount than the claim of complainants. The bill prays a *pro rata* division of the fund collected. The unauthorized bléding, by the executor in chief, of a debt due to himself or to complainants, with a debt to the estate of his testator, can not confer a right on complainants to go against the estate of Savage. If Benham had collected of Dillahuntz more than was due to testator's estate, that balance would, *ex æquo et bono*, belong to complainants, or to George M. Savage. Whether such balance could be recovered by suit in chancery at the instance of complainants, we are not called upon to

decide, as the bill contains no averments to raise this question.

Another view is fatal to this bill. There is no averment, denying that Geo. M. Savage obtained credit in his administration for the moneys lent to Dillahunt, and those paid to Patton.—See *Jones v. Dawson, supra*.

There is no equity in the bill, and the decree of the chancellor is affirmed.

HALL vs. COCKRELL.

[ACTION AGAINST AGENTS FOR BREACH OF COVENANT.]

1. *Agent of municipal corporation not public agent.*—Where the charter of an incorporated town provides, that its corporate name shall be “the town of E.”, and that all its corporate powers shall be vested in, and exercised by and through, an intendant and certain councillors, who shall constitute a board to be called “the intendant and council of the town of E.”; the persons composing the board are but the directors and agents of the corporation, and in making contracts under color of their authority as such agents, they are not to be considered as public, or government agents, contracting in behalf of the public.
2. *When covenant of agent does not bind principal.*—By a contract under seal, between plaintiff of the first part, and “the intendant and council of the town of E.”, who were the executive board of the corporation styled “the town of E.”, of the second part, plaintiff covenanted to perform certain services in repairing the streets of said town, “in consideration of which said services, the parties of the second part” agreed to pay him a stipulated sum of money; and “the said parties” signed their individual names, and affixed their seals to the contract: *Held*, that the instrument was not the deed of the corporation.
3. *When agent is liable individually on his covenant.*—Where an agent signs and affixes his name and seal to a covenant, which, although he describes himself as agent, contains apt words to charge him personally, and which is not binding as the deed of his principal, he is personally responsible on it, and the superadded words are a mere *descriptio personae*.

APPEAL from the Circuit Court of Greene.

The record does not show the name of the presiding judge.

This action was brought by Joseph W. Hall against Samuel W. Cockrell, and the complaint was as follows :

"The plaintiff claims of the defendant \$350, for the breach of an agreement entered into by him on the 7th March, 1854, as follows: 'The following agreement was made and entered into this 7th day of March, A. D. 1854, by and between Joseph W. Hall, of the first part, and the intendant and council of the town of Eutaw, of the second part; that is to say: The party of the first part, for the consideration hereinafter to be named, engages and contracts to work the streets of said town, from the day of the date hereof, until the first day of January, 1855, and to keep said streets in good order and repair; also, to do and perform all necessary work to and upon the side-walks of said town; also, to put in all necessary boxing, and to dig such ditches as may be necessary and useful to carry off and drain the water from said town. And the said party further stipulates and engages to become liable for and to pay all costs and damages that said town may be subjected to, either by indictment by the grand jury or otherwise; provided the same arise from said streets, alleys and side-walks being in bad order and repair, from the 7th March, 1854, until the said 1st January, 1855. And the said party of the first part further agrees that, besides his general superintendence of said streets, side-walks and alleys, he is also to do and perform such work upon said streets and side-walks, as the intendant or any member of the council may direct and require; and, upon his failure so to do, that he forfeits the sum of \$10, to be deducted from the consideration hereinafter mentioned, for each and every such failure. In consideration of which said services, the parties of the second part agree to pay the said Hall the sum of \$300, on the first day of January, 1855, and further to allow the said party of the first part a sum, not exceeding \$50, for the purchase of such lumber, plank, &c., as may be necessary for the use of said town for the purposes aforesaid; and should the said sum be inadequate for this purpose, the said Hall is to make up the deficiency out of his own funds, or allow the said parties of the second part a deduction from the said sum of \$300 to the amount of such excess. The said party of the first part is to be allowed the

use of all the street tools and implements belonging to said town, which he is to return to the authorities of said town on the first day of January, 1855. The street horse and cart are hereby reserved by the parties of the second part, to be disposed of as they may deem expedient and proper. In witness whereof, the said parties have hereunto set their hands, and affixed their seals, this 7th day of March, 1854.'

(signed) J. W. Hall, [seal.]

James W. Brook, Int. [seal.]

R. Leachman, [seal.]

W. H. Fowler, [seal.]

S. W. Cockrell, [seal.]

"Yet, although the plaintiff has complied with all the provisions of this agreement on his part, the defendant has failed to comply with the following provisions thereof: the plaintiff has not been paid the said \$300, nor any part thereof, which the defendant agreed to pay him as aforesaid; nor has he been allowed any portion of said sum of money, not to exceed \$50, which the defendant agreed to allow him for the purchase of lumber and plank, although he has expended for that purpose divers sums of money out of his own means to the amount of \$50."

The defendant demurred to the complaint, on the ground "that the contract therein set forth shows upon its face that it is not personally binding on this defendant, but is the contract of the intendant and council of the town of Eutaw." The court sustained the demurrer, and its ruling is now assigned as error.

JOSEPH W. TAYLOR, for the appellant:

Under the charter of the town of Eutaw, the intendant and council were not a corporation: they were mere statutory agents, or trustees, authorized to execute the powers of the corporation. The town of Eutaw has not contracted, under the instrument declared on, either by its corporate name, or under its seal. The contract never was binding on the corporation. The parties of the second part had no general right to make it.—1 Stew. 299; 5 Porter, 279; 4 Ala. 561; 2 Cranch, 168; 15 Johns. 358. They had no special grant of right, express or implied, to make it; but, on the contrary,

such right is effectually denied and excluded, 1st, by the fact that the charter prescribes the mode in which the intendant and council were to provide for the working of the streets, and, since that mode was not observed, the corporation is not bound; 2d, by the necessary operation of the 18th section of the charter, with the proviso thereto. These facts bring the case within the well-established rule, that the contract of an agent, when it does not bind his principal, binds him individually.—*Taft v. Brewster*, 9 Johns. 334; *Harwood v. Humes*, 9 Ala. 659; *Gillespie v. Wesson*, 7 Porter, 454; *Lazarus v. Shearer*, 2 Ala. 718; *Skinner v. Gunn*, 9 Porter, 305. In such case, even a subsequent ratification by the principal will not defeat the individual responsibility of the agent.—*Lazarus v. Shearer*, *supra*. The demurrer ought, therefore, to have been overruled.

E. MORGAN, *contra*:—1. The obligation sued on must be either the personal contract of the parties of the second part, or the official contract of the intendant and council of the town of Entaw. It cannot be their personal contract, because, as between them personally and the plaintiff, there is no mutuality of obligation.—13 Ala. 836. It must be the official contract of the intendant and council, for the further reason, that the plaintiff contracted expressly with them as such, and is thereby estopped from denying that he contracted with them, and they with him, in that capacity.—5 Ala. 808.

2. By the act of incorporation, all the corporate powers of the town are conferred on the intendant and council, and are to be exercised by and through them; and therefore every act of theirs, within the scope of the powers conferred on the town, is the act of the town, and binds the corporation.—*Angell & Ames on Corporations*, pp. 203, 258–9.

3. The charter authorizes and requires the intendant and council to cause the streets and roads to be kept in good order, and provides the means of performing that duty; but the manner in which this duty is to be performed, and this authority exercised, is not prescribed by the act of incorporation, and is left to the discretion of the board. The board has contracted so as to bind the corporation, and therefore

the corporation alone is bound.—*Randall v. Van Vechten*, 19 Johns. 64; 2 Ala. 725; 9 *ib.* 661; A. & Ames on Corporations, pp. 104-5, 272-5.

RICE, C. J.—By the act of 2d January, 1841, entitled “an act to incorporate the town of Eutaw in Greene county,” it is declared, among other things, that certain parcels of land therein described shall constitute the corporate limits of the town of Eutaw; that the free white inhabitants, dwelling within the said corporate limits, and their successors forever, shall be a body politic and corporate, by the name of “the town of Eutaw”, and by that name may have and use a common seal, which they may alter at their pleasure, and may sue and be sued, implead and be impleaded, in any court, and may receive, purchase, and hold property, real or personal, not exceeding fifty thousand dollars in value, and may lease, sell, use or dispose of any such property, in any manner they may think proper for the use and benefit of said town; that the corporate powers of said town shall be vested in, and exercised by and through, an intendant and four councillors, who, when qualified and elected as prescribed in said act, shall constitute a board, to be called “the intendant and council of the town of Eutaw”; and that the intendant and council of said town are authorized and required to cause the roads, streets, and alleys in said town, to be kept in good order and free from obstructions, &c., &c.—Pamph. Acts of 1840-I, pp. 26-31.

The only corporation created by that act, was “the town of Eutaw.” Although the persons who, during any particular period, were the intendant and councillors of said town, were, during that period, authorized to exercise the corporate powers thereof; yet these persons were but the directors and agents of the corporation. In making contracts under color of their authority as such agents, they are not to be considered as public, or government agents, contracting in behalf of the public; but, at most, as agents contracting in behalf of a corporation capable of making contracts, and liable to an action on its contracts.—*Simonds v. Heard*, 23 Pick. Rep. 120; Story on Agency, (ed. of 1851,) §§ 282, 285, 305; Meriel

v. Wymansold, Hardres, 205; Furnivall v. Coombes, 5 Mann. & G. 736-752; Gill v. Brown, 12 Johns. Rep. 385.

The instrument executed by them, as the same is set forth in the complaint in the case at bar, is *under seal*, and to it their names and seals are affixed. It does not purport on its face to be the deed of the corporation, nor to have been executed in its name and behalf. It does not contain any covenant on behalf of the corporation, that it will pay or do any thing. The seal of the corporation is not affixed to it. But, after setting forth in its commencement that the agreement contained in it was made and entered into "by and between Joseph W. Hall, of the first part, and the intendant and council of the town of Eutaw, of the second part", and then setting forth the covenants of "the party of the first part"; the instrument proceeds as follows—to-wit: "In consideration of which said services, *the parties* of the second part agree to pay the said Hall the sum of three hundred dollars on the first day of January, 1855," &c., &c. * * * "The street horse and cart are hereby reserved by *the parties* of the second part, to be disposed of as *they* may deem expedient and proper. In testimony whereof, the said parties have hereunto set *their hands*, and affixed *their seals*," &c.

Conceding that the corporation may be liable in some mode and in some form of action, yet it is clear it cannot be sued *on the instrument*, as its deed,—it not being in the name, nor under the seal, of the corporation.—Story on Agency, §§ 147, 148, 149, and cases cited in note 2 to section 149; Dawson v. Cotton, 26 Ala. 591.

As the instrument cannot be deemed the deed of the corporation, it will be utterly without any legal effect, in favor of "the party of the first part", unless it be construed to be the deed of "*the parties* of the second part." The law will not impute to them the intention to do a void act; but, *ut res magis valeat, quam pereat*, it will rather be presumed that it was their intention, as agents, to be bound for their principal. They have, in the *commencement* of the instrument, described themselves as "the intendant and council of the town of Eutaw"; which may fairly be construed as a description of themselves as agents. But the covenants in favor of Hall, contained in the instrument, appear on its face to be the

covenants of *the individuals* who, as individuals, and as "*the parties* of the second part," entered into them, and who as *individuals* "set *their hands* and affixed *their seals*" to them. In the instrument, there are apt words to charge them personally, when construed in connection with *their individual names and seals* which *they* affixed to it, and with the act incorporating the town of Eutaw. The words, "*the intendant and council of the town of Eutaw*", as used in the instrument, may well be treated as a mere *descriptio personarum*; as a mere designation of the corporation, by whose authority and for whose benefit they were acting, and not as intended to exclude a personal responsibility.—Story on Agency, §§ 273, 278, 280, 281; Lazarus v. Shearer, 2 Ala. 724; Simonds v. Heard, 23 Pick. R. 120; Rossiter v. Rossiter, 8 Wend. 494; Arfridson v. Ladd, 12 Mass. 173.

Without saying more, we sanction, as applicable to the case as now presented, the following doctrine: that where the instrument is under seal, and the agent is a direct party to it, and the principal is not, so that the latter is not, *ex directo*, suable thereon, there the agent, although he describes himself as agent, is suable upon the covenants and agreements contained therein, as his own personal contract. We admit, that this doctrine is not applicable to a case where the instrument does not contain any apt words to charge the agent personally, as illustrated in Hopkins v. Mehaffey, 11 Serg. & Rawle, 126; Story on Agency, §§ 278, 291, 270; Tippetts v. Walker, 4 Mass. R. 595. See also the authorities cited *supra*; Whiteside v. Jennings, 19 Ala. 784; Walker v. Swartwout, 12 Johns. R. 444; Aven v. Beckom, 11 Georgia R. 1, and authorities therein cited; Steele v. McElroy, 1 Sneed, 341.

The action of the court below, in sustaining the demurrer to the complaint, was in conflict with the law as hereinabove declared, and was erroneous. Its judgment is therefore reversed, and the cause remanded.

STANLEY vs. NELSON.

[ACTION ON NOTE UNDER SEAL GIVEN FOR HIRE OF SLAVE.]

1. *Slave may be agent.*—A slave may act as the agent of his owner or hirer.
2. *Contract founded on illegal consideration.*—A contract founded directly on an illegal consideration, whether the illegal act is in terms prohibited, or is only punished with a penalty,—is void.
3. *Contract made with slave while suffered to go at large.*—If a slave, while permitted by his owner or hirer, contrary to the provisions of the act of 1805 (Clay's Digest, 541, § 12), to go at large, and to act as a freeman, makes a contract for the hire of another slave to work with him, and a white man gives his note under seal for the hire, the note is void.
4. *Charge upon evidence, when erroneous.*—A charge upon the effect of evidence, which is susceptible of a different construction from that placed on it by the court, is an invasion of the province of the jury, and therefore erroneous.
5. *Appropriation by slave, while suffered to go at large, of proceeds of his labor.*—If a slave, while suffered by his owner or hirer to go at large and act as a freeman, appropriates the proceeds of his labor, with the consent of his owner or hirer, to the payment of a debt, the owner or hirer cannot afterwards reclaim them; and, *a fortiori*, a third person cannot afterwards claim to have them applied in payment of a liability incurred by him for the slave.

APPEAL from the Circuit Court of Limestone.

Tried before the Hon. JOHN E. MOORE.

This action was founded on a promissory note, of which the following is a copy :

"\$140. Twelve months after date, I promise (to pay), to the order of Thomas A. Nelson, one hundred and forty dollars, for the hire of George for the year 1852. Witness my hand and seal, January 2, 1852."

(signed) "H. Stanley."

A credit was endorsed on the note, in these words: "Rec'd \$65 85 on the within, for R. Donnell's note, June 1, '53, less the interest off, January 2, 1853." The only plea was the general issue, "with leave to give in evidence any defense which would be good if well pleaded."

On the trial, as appears from the bill of exceptions, after the plaintiff had offered in evidence the note declared on, the defendant read in evidence certain interrogatories which he

had propounded to the plaintiff under the statute, together with the answers thereto, which were as follows: "The hire of a negro boy, named George [was the consideration of the note sued on.] The price for the hire of said negro was agreed on with the boy Spencer, provided he brought me a note, or bond, from some responsible white man, who should control said boy George during that year. The said boy Spencer [handed me the note.] I did not make any bargain with the defendant at the time of hiring him said boy, but afterwards spoke to him on the subject, and he acknowledged the transaction. I do not recollect the time [of this conversation:] it was after the maturity of the note given for the hire, and on the public square in Athens. I spoke to the defendant several times about the note, and he never objected to its payment, or intimated that he was not bound for the same. The boy Spencer was engaged in the business of painting. The business [in which the boy George was to be employed] was not particularly agreed on, but I supposed he would be kept at his trade, which was painting. I did not hire him specially to learn the art of painting; he was then a good painter. The boy Spencer belonged, I think, to Mr. Thompson, though he was that year under the control of Wm. E. Hoke. I think he was in the habit of making his own contracts, which were sanctioned and acknowledged by said Hoke as his own. He continued to do this, so far as I know, during the year for which George was with him. I received from said Spencer that year, with the understanding that they were to go to the credit of an account due me for the hire of George for the preceding year, the following amounts: for painting my house, \$13 50; J. H. Malone's note, due January 1, 1853, \$67 10. I also received from said Spencer, with the agreement that the same was to be credited on defendant's note, Robert Donnell's note, for work, paints, &c., furnished, which netted, on the 2d January, 1853, \$65 85, and which I took for the protection of said defendant. In this item (\$65 85) I think the work done was worth \$20, or \$25; the balance being for paints, &c., furnished. I do not know [whether the boy George was in the possession of the defendant, or served him, during that year.] I exercised no control over him during that year, presuming

that his owner for the time being (to-wit, said Henry Stanley) would direct his movements; and whether he got the benefit of his services, or any portion of them, I do not know."

"The defendant also introduced as a witness William E. Hoke, who testified that he knew the boy Spencer, and that he belonged to Madison Thompson; that he had hired Spencer from his owner for the year 1852; that he permitted said Spencer, who was a painter, to go at large during the term of his hiring, to make his own contracts for work and services, and to collect the money therefor; that witness paid Thompson the hire, and that the understanding was, that Spencer was to pay witness the amount of the hire, and was himself to have the balance of his earnings; that Spencer brought him notes and accounts against persons for whom he worked, sufficient to pay said hire; that witness claimed nothing over what said hire amounted to, and recognized the right of said Spencer to make collections for his said work, but, if any had refused to pay, witness then considered that he had a right to sue therefor; that Spencer did business in the same way in the year 1851, and for several years prior thereto; that plaintiff's said boy, George, was with said Spencer during the years 1851 and 1852, and worked with him."

"This was all the evidence in the cause;" and thereupon the defendant requested the following charges to the jury:

"1. That if they found that the note sued on was given upon the contract, and in the manner, stated in the plaintiff's answers, then the plaintiff could not recover thereon; which charge the court refused to give, but instructed the jury, that if the note was given as specified in said answers, the plaintiff was entitled to a verdict. To the refusal to charge, and to the charge given, the defendant excepted.

"2. That if they found that the note sued on was given for the hire of the negro boy George for the year 1852; that plaintiff bargained and hired said boy to Spencer, who was himself a slave, but was permitted by his owner to go at large and contract for himself, and received the note sued on from said Spencer, and never had any interview with the defendant until after the maturity of the note; and that said George worked with said Spencer during the term of hiring,

and did not work with the defendant,—then the plaintiff was not entitled to recover. The court refused this charge, and the defendant excepted.

“3. That if the boy Spencer was a slave, but was suffered to go at large, and to hire himself out, or to make contracts for his services, and to receive the money therefor; and that plaintiff, knowing this, hired the boy George, to go at large with said Spencer; and to work with him, and suffered him so to do during the term of hiring; and that the said note was taken for such hiring,—then the said note is void, and a recovery cannot be had on it. The court refused this charge also, and the defendant excepted.

“4. That if the jury found that the plaintiff received the sums of money mentioned in his answers, from the proceeds of the labor of said Spencer and George during said hiring, then the defendant was entitled to a credit therefor on the note sued on, notwithstanding the said agreement with said Spencer; and that said Spencer could make no valid agreement to appropriate said proceeds of said labor to the hire of George for the preceding year. The court refused this charge also, and the defendant excepted.”

The charge given, and the refusals to charge as asked, are now assigned as error:

ROBINSON & JONES, for the appellant.

LUKE PRYOR, *contra*.

WALKER, J.—There are three questions, arising from the charges given and refused in this case, the decision of which is necessary and appropriate. Those questions may be thus stated: 1. Can a slave act as the agent of his owner, or hirer? 2. If the owner or hirer of a slave, in 1852, suffered him to go at large, and to act for himself as a freeman; and if, while so going at large and acting, the slave made a contract for the hire of another slave, to work with him, for a stipulated sum, for which a white man gave his bond, is that bond a void instrument? 3. If the slave, while going at large and acting for himself, by the owner or hirer's consent, as above stated, appropriated debts in his favor for services rendered by him, to the payment of another debt,

which the slave owed the payee in said bond, has the maker of the bond a right to have the debts so appropriated credited upon his bond?

The first question we decide in the affirmative, on the authority of the case of the Governor v. Donly, 14 Ala. 471; see, also, Powell v. The State, 27 *ib.* 51.

As the bond sued upon is dated 2d January, 1852, its validity is determinable by the law as it then existed. The statute law of this State, as it existed in 1852, which it is necessary to notice, may be found in Clay's Digest, §§ 12-13, page 541. Section 12 is as follows: "If any master, or owner of a slave, shall license such slave to go at large and trade as a freeman, the master or owner shall forfeit and pay the sum of fifty dollars, one moiety to the use of the person suing for the same, and the other moiety to the use of the State; and if, after conviction, such slave shall be so found going at large and trading, the master or overseer (?) shall again be liable to the like penalty, to be recovered as aforesaid; and so as often after such conviction as such slave shall be found so going at large and trading." The part of section 13 pertinent to the question to be decided, is as follows: "If any person shall permit his or her slave to go at large, or hire him or herself out, every person or persons so offending shall forfeit and pay to the use of the State the sum of fifty dollars."

These statutes had their origin in a wise and conservative legislative policy. Their purpose was, to prevent the demoralization and corruption of slaves, resulting from a withdrawal of discipline and restraint from them, and to prevent the pernicious effect upon the slave community of the anomalous condition of servitude without a master's control. If the owner or hirer of a slave permits him to go at large, to make contracts, and to carry on business as if he were a freeman, notwithstanding the slave may make compensation for this privilege, the law, as it existed in 1852, is not only violated in its letter, but in its wise policy. The act of the negro, in going at large and contracting for himself by the owner or hirer's permission, must be deemed a violation of the same law, because it is that which subjects the master to a penalty. It can not be lawful in a negro, to do that by the master's

permission, which it is unlawful in the master to permit him to do. The law condemns the going at large and trading of a slave, as a freeman, by the license of his owner; and the acts of the slave, done by such license, are illegal, notwithstanding the penalty is visited upon the person giving the permission, and not upon the slave.

Section 13, in addition to what is copied above from it, also provides, that any person may apprehend a slave, going at large, or hiring himself out, and carry him before a justice of the peace, who may commit him to jail. This is persuasive to show that the legislature designed to condemn as illegal the act of the slave, as well as the permission of the owner.

A contract, made directly upon a consideration which is illegal, is void.—Chitty on Contracts, 571; Tennison v. Martin, 13 Ala. 21; Renfro v. Heard, 14 *ib.* 24; Branch Bank v. Crocheron, 5 *ib.* 250; Smith v. Ala. Life Ins. & T. Co., 4 *ib.* 558. The law is the same, although the law which is violated provides a penalty for the act done, and does not in terms prohibit it.—Parsons on Contracts, 380, 381, 382, and note *a* on page 382, which collates the American authorities. It can make no difference, that the license to go at large and contract as a freeman is given by the hirer instead of the owner of the slave, for the hirer is, for the term of the bailment, the owner of the negro for all the purposes of the statutes cited.

By the principles which we have laid down, we are led to the conclusion, that the second question propounded in the outset of this opinion must be decided in the affirmative; or, in other words, if the bond sued on was given directly in consideration of a contract, made with a slave, to hire a negro to the slave, while the slave was by the permission of his owner or hirer going at large and contracting as a freeman, it is void.

The court charged the jury, that if the bond sued upon was given as specified in the plaintiff's answers to interrogatories, the plaintiff was entitled to a verdict. The effect of this charge was, that the contract, as set forth in the testimony elicited upon a discovery obtained from plaintiff, was one upon which a recovery might be had, and the jury must find for the plaintiff if the evidence in the case showed that

the contract was as set forth in that particular testimony. All the evidence in the case is set out in the bill of exceptions. The charge given can only be maintained, as a correct exposition of the law, in the event it is found that the testimony obtained by discovery from the plaintiff did not warrant any inference fatal to his right of recovery in the suit. It is an invasion of the province of the jury for the court to instruct them, to the prejudice of a party, as to the effect of evidence susceptible of a construction different from that placed upon it by the court.—*Hollingsworth v. Martin*, 23 Ala. 591; *Dill v. The State*, 25 *ib.* 15.

The court most probably gave the charge excepted to, upon the supposition, that the testimony afforded by plaintiff's answers established the fact that the slave, in making the contract, acted as the agent of his hirer or owner. We do not intend to determine, what is the proper construction of the testimony; but we do decide, that the court was not authorized to assume that no inference adverse to the plaintiff's right of recovery could be drawn from it. The question should have been left to the jury, whether, in making the contract for hire, the slave was acting for and as the agent of his hirer or owner, or whether he was acting for himself, when he was going at large and contracting as a freeman by the license or permission of his owner or hirer.

The second charge asked by the defendant was altogether consistent with the principles laid down in this opinion, and the court erred in refusing to give it.

After a slave has, with his owner or hirer's consent, made acquisitions by his labor, and, in the absence of a revocation of such consent, has absolutely disposed of them, it would not be competent for the master even to reclaim them.—*Shanklin v. Jones*, 9 Ala. 271. Still less could any third person reclaim such acquisitions, after they had been so disposed of by the slave, for the purpose of having them credited on a liability incurred by him for the benefit of the slave. The slave appropriated an account and note given for his services, while going at large, to the payment of a debt which the plaintiff held on the slave, aside from the bond sued on. The defendant insisted that the amount of the note and account so appropriated should be credited on the bond sued on. We

think he was not entitled to a credit asked upon such a state of facts, and that the court properly so ruled. In our opinion, the negative of the third question stated at the commencement of this opinion is the law, and the last charge asked by the defendant was properly refused.

The judgment of the court below is reversed, and the cause remanded.

CARROLL vs. MALONE.

[BILL IN EQUITY BY OBLIGOR AGAINST ASSIGNEE TO ESTABLISH EQUITABLE SET-OFF.]

1. *Burthen of proof as to negative averment.*—Where the bill alleges a negative, *e. g.* that complainant had no notice of the assignment of a note against which he seeks to establish an equitable set-off, and the answer avers notice, the burthen of proving notice is on the defendant, and not on the complainant to disprove it.
2. *Equitable set-off against assignee of bond.*—If a note under seal is assigned by endorsement after maturity, the assignee takes it subject to all equitable defences existing in favor of the maker prior to notice of the assignment, whether they grow out of the same, or out of a different transaction. (WALKER, J., *dissenting*, held that, where the assignee acquired the legal title by endorsement, without notice of the maker's equity, he ought to be protected.)
3. *Estoppel by deed.*—If the maker of a note, having an equitable set-off which is available against an assignee after maturity, executes a mortgage to the assignee, to secure the payment of the note, this does not estop him from afterwards setting up against the assignee his equitable set-off.

APPEAL from the Chancery Court of Franklin.

Heard before the Hon. A. J. WALKER.

This bill was filed by George W. Carroll against Goodloe W. Malone and John L. Malone. The material facts of the case are stated in the opinion of the court. On final hearing, on pleadings and proof, the chancellor dismissed the bill; and his decree is now assigned as error.

R. W. WALKER, and WM. COOPER, for the appellant:

1. Independent of our statute in reference to the assignment of bills, bonds, &c., Carroll would be entitled to the re-

lief sought by his bill. The suit of *Malone v. Carroll* was founded on Carroll's *bonds*, payable to Clark T. Barton. These bonds, according to the rules of the law merchant, were not negotiable instruments; bills of exchange and promissory notes payable to order, alone belonging to that class. These negotiable instruments, according to the theory of the law merchant, were the representatives at once of money and of credit, and were placed, for the purposes of commerce, under the peculiar protection of that law, and were distinguished, in many respects, from all other choses in action. The general rule governing the assignment of choses in action, other than these negotiable instruments, is, that the assignee takes them subject to all equities existing at the time of the assignment, whether arising out of the same transaction or not, and that the right of set-off is one of these equities.—*Tusculum & Decatur Railroad Co. v. Rhodes*, 8 Ala. 223, and cases there cited. When these bonds were executed by Carroll, the only instruments which, under our statutes, were governed by the commercial law, and belonged to the class of negotiable instruments, were bills of exchange and promissory notes payable in bank. Carroll, then, our statutes aside, would undoubtedly be allowed, in a suit against him by the assignee of these bonds, to interpose every equitable defence to which he would have been entitled in a suit by the obligee; and, unless these statutes have altered the rule applicable to such instruments, the facts in this case make out a clear case of equitable set-off. The equitable rights growing out of insolvency, attach immediately, and as soon as it exists, and cannot be defeated by a subsequent assignment.—8 Ala. 223, and cases cited.

Does our statute, in reference to the assignment of bonds and notes, take away this right of the obligor? That statute simply makes these bonds assignable by endorsement, and provides that, in all suits by the assignee, all discounts, payments and sets-off, made or had prior to notice of the assignment, shall be allowed. Was it the object of this statute to place bonds on the footing of negotiable instruments in all respects, and to limit the defences which the obligors were previously entitled to make; or simply to make them assignable by endorsement, and to extend the right of the obligor to all defences acquired prior to notice of assignment? The statute

diminishes, instead of increasing the number of negotiable instruments, in the sense in which that term is used in the mercantile law, for, before that statute, promissory notes payable to order were negotiable instruments, governed by the rules of the commercial law, and therefore the assignee took them discharged of all the equities between the original parties; but the statute takes these notes out of the privileged class, and the assignee now takes them subject to all defenses obtained by the maker prior to notice of the assignment. This statute was intended, then, not to impair, but to enlarge the pre-existing rights of the obligors in bonds. The assignees of such bonds, therefore, take them clogged with all the equities existing between the original parties prior to notice of the assignment. Previous to the notice in this case, the equitable rights of Carroll, now sought to be enforced, had attached; and he can set up these rights as fully against the assignee, as he could against the obligee.

2. Again, when these bonds were assigned by Barton, they were overdue, and Malone therefore received them subject to every equity that would have availed against the obligee. *O'Callaghan v. Sawyer*, 5 Johns. 118; *Tuttle v. Beebe*, 8 *ib.* 153; *Wells v. Tate*, 5 Blackf. 306; *Hurd v. Earle*, 4 *ib.* 184; *Mixon v. English*, 3 McCord, 549; *Wood v. Warren*, 19 Maine, 23; *Burnham v. Tucker*, 18 *ib.* 179; *Caine v. Spann*, 1 McMullen, 258; *Perry v. Mayes*, 2 Bailey, 354. See, also, the following cases: 16 Wend. 659; 11 *ib.* 504; 17 Johns. 330; 7 Leigh, 278; 19 Wend. 397; 11 B. Monroe, 73; *ib.* 212. The cases which hold that the assignee of overdue paper takes it subject only to the equities which arise out of the same transaction, are cases which refer entirely to instruments which were considered negotiable by the rules of the law merchant. The precise point here raised, it is believed, has never been decided against the appellant; *i. e.* that the assignee of discredited unnegotiable paper takes it subject only to those equities which arise out of the paper itself.

The very recent decision of this court, in the case of *Wray's Adm'rs v. Furniss*, 27 Ala. 471, is conclusive of this case. See, also, *Wathen v. Chamberlain*, 8 Dana, 164; *Ridgway v. Collins*, 3 Marsh. 412.

3. Carroll has done nothing which can estop him from in-

sisting on his right of equitable set-off.—*Andrews & Bro. v. McCoy*, 8 Ala. 920; *Clements v. Loggin*, 2 *ib.* 514; 4 Blackf. 356; *Livingston v. Dean*, 2 Johns. Ch. 479; *Clute v. Robinson*, *ib.* 612; *Smith v. Pettus*, 1 Stew. & P. 107; *Taylor v. Bates*, 5 Cowen, 378.

4. The allegation of the answer, as to the giving of notice of the endorsement to Carroll, was suggestive of new matter, and not responsive merely.—*Carpenter v. Dunn*, 6 Ala. 726; *Wellborn v. Tiller*, 10 *ib.* 311; 11 Johns. 63; 1 *ib.* 91; 11 Ves. 574; 4 Paige, 23; 2 Madd. Ch. Pr. 137.

JOHN A. NOOE, *contra*, contended that there was no equity in the bill, because,—

1. The assignee of a note takes it subject only to such equities as exist at the time of the assignment, and not such as may exist up to the time of notice of the assignment. This was expressly decided in *Andrews & Bro. v. McCoy*, 8 Ala. 929.

2. The equity which attaches to a note, in the hands of an assignee, must grow out of the transaction for which the note is given.—1 Stew. & P. 107; 7 Porter, 543; 8 Ala. 122; *ib.* 929; 13 *ib.* 752; 14 *ib.* 22; Chitty on Bills, 246; Story on Promissory Notes, § 178; 5 Mason, 214.

3. Carroll is estopped by his admissions, and by the execution of his mortgage, from setting up any equity, or equitable set-off, against Malone.—11 Ala. 422-5; *ib.* 472; *ib.* 976; 14 *ib.* 16; 16 *ib.* 175; 19 *ib.* 490; 22 *ib.* 548; 23 *ib.* 271; 2 Humph. 51; Greenl. Ev. §§ 24, 27, 184, 196, 205, 207, 208.

4. A party who seeks relief in equity must act promptly, upon first knowledge of the facts which constitute his equity. Carroll's bill shows that he was guilty of great laches and neglect, in not informing Malone of his equity; and therefore he is not entitled to the relief claimed.—14 Ala. 16; 2 U. S. Digest, 205; 2 Ph. Ev. 199, note; Leading Cases in Equity, vol. 2, pt. 2, p. 216.

5. Admitting that the assignee of a note takes it subject to all the equitable sets-off, which the maker may have against the assignor up to the time of notice of the assignment, the proof shows that Carroll had notice before he became Barton's surety. Malone's answer positively avers notice to

Carroll, and the answer is responsive to the bill on this point, as Carroll had executed to Malone a mortgage to secure the payment of the notes.—*Brashear v. West*, 7 Peters, 608; *Wray's Adm'rs v. Furniss*, 27 Ala. 471; 16 *ib.* 602; 6 *ib.* 718; 4 *ib.* 60; 3 *ib.* 478; 1 Walker's (Mich.) R. 294; 2 Blackf. 330; 1 Conn. 711.

6. The proof sustains the answer as to notice. The deposition of William Winston directly disproves the averment of the bill, which is relied upon as equivalent to an averment of the want of notice. The depositions of Goodloe and Garrett prove facts which are inconsistent with this averment of the bill; and Carroll's own conduct towards Malone, in not intimating to him that he had any objection to the payment of the notes; in his repeated promises of payment; in his executing a mortgage to Malone to secure the payment, eighteen months after the assignment, and twelve months after he is proved to have had notice of the assignment, and at a time when he, as executor of Barton, had reported the estate insolvent, and when he knew that he was bound as surety to pay the amount which he now seeks to set off against Malone; and his causing Malone to indulge him in the payment for five years,—all these circumstances tend to show that he had notice of the assignment to Malone before he became Barton's surety, and sustain the allegation of the answer upon the question of notice.

STONE, J.—The bill in this case was filed to obtain the benefit of an equitable set-off. The important points made by the pleadings and proofs are, that Carroll executed his notes to Clark T. Barton, for near \$9,000, dated and due January 1, 1847; that when these notes were over due, viz., not earlier than February, nor later than April, 1847, Barton traded and endorsed said notes to Goodloe W. Malone, in part payment of a pre-existing debt, and soon after this, Goodloe W. Malone traded and endorsed them to John L. Malone, likewise in part payment of a pre-existing debt; that Carroll incurred liabilities, as accommodation endorser for Barton, on May 7, 1847, of over \$5,000, and on July 13, 1847, of \$2,000; and that on July 8, 1848, Carroll executed a mortgage to John L. Malone, securing the notes so transferred by Barton.

Two other questions of fact, raised by the pleadings and proof, are necessary to be here settled: first, was Barton insolvent, and when did he become so; and, second, when did Carroll receive notice of the endorsement of his notes by Barton to Malone? We are fully satisfied that Mr. Barton was insolvent long anterior to May 7, 1847. It is insisted in argument, by the appellee, that the answers, where they deny that Carroll had notice, and aver that he (Carroll) did have notice of the assignment of the notes to Goodloe W. Malone, before May 7, 1847, are responsive to the bill, and are therefore evidence of the facts thus set up. In support of this position, we are referred to *Brashear v. West*, 7 Peters, 608. The citation sustains the argument, but we are not prepared to adopt the rule there laid down. No authorities are cited in support of it; and it is in direct conflict with our decisions on the same point.—*Walker v. Palmer*, 24 Ala. R. 358, and authorities cited; *McCauley v. State*, 26 Ala. 135; *Carpenter v. Devon*, 6 Ala. 718.

The complainant, Carroll, to make a case for relief, was compelled to aver, in substance, that he incurred the liabilities for Barton before he had any notice of the assignment of his notes. This he in effect did, when he stated that "he unhesitatingly endorsed for Barton, knowing that he was indebted to him, and relied upon his indebtedness as protection against loss." In another place the bill says, "Now, after incurring the said several liabilities for said Barton by your orator, and when your orator had not yet been compelled to pay any of them, and learning that said Barton had transferred and traded away to Goodloe W. Malone, of said county, the two notes," &c. The answers aver notice. To hold the answers, under such circumstances, to be proof of the affirmative fact, would be to establish the monstrous proposition, that the necessary averment of a negative in pleading imposes on the party thus pleading the necessity of proving that negative, when put in issue by the adverse party.

Some slight circumstances are relied on, as tending to prove that Carroll had notice; but they are insufficient for the purpose. We are, therefore, unable to find from the proof that Carroll had notice of the assignment, until after he had incurred the liabilities for Barton.

It is further shown by the pleadings and proofs, that Carroll paid the two debts of \$2,000 each, and half of the debt of \$3,352, before he filed his bill.

Two questions are presented: 1. Under these facts, is Carroll's equity superior to Malone's? 2. Is Carroll estopped from asserting his claim of set-off, by the mortgage he executed?

The doctrine of equitable set-off has been frequently before this court. In the case of the T. C. & D. R. R. Co. v. Rhodes, 8 Ala. 206, the question was elaborately considered; and, after being twice argued, the court allowed the set-off, in a case precisely like the present, with the exception, that in this case the *legal title* to the note or bond passed to Malone, while in that, the debt of Rhodes was unassignable, and Sherrod acquired only an *equitable interest* in it. In that case may be found a careful and labored collation of the authorities, English and American. The court declared the law to be, that Rhodes was entitled to the set-off claimed; but, if his debt had been assignable, and had been endorsed to Sherrod, the opinion asserts that the set-off would not have been allowed. The cases of Robertson v. Breedlove, 7 Porter, 543, and Donelson v. Posey, 13 Ala. 752, lay down the rule in substantially the same language.

In the authorities from this court above quoted, all is mere *dictum* that speaks of a distinction between unassignable choses in action, and notes or bills endorsed after due; but the same distinction is observable in a strong array of authorities, some of which are noted on the briefs of counsel.

Another distinction arose, early in the history of this question, which bears on the point in issue. It is said in the books, that assignees of bills or notes, who receive them after they are due, and thus dishonored, take them subject to all defences, both legal and equitable, which the promisor could assert against the payee. In the case of Brown v. Davis, 3 Term R. 80, the court uses the strong language, that under such circumstances, the party who receives the note, "*takes it on the credit of the person who gives it to him.*" The qualification is, that the *equities* to which a bill or note thus traded is subject, are those which *arise out of the bill or note transaction itself*. A strong array of authorities recognizes this distinction. Many of them are collected and reviewed in

Greene v. Darling, 5 Mason, 201; Burrough v. Moss, 10 B. & C. 558; Ord v. White, 3 Beav. 357; Ford v. Stuart, 19 Johns. 342; Tuttle v. Beebe, 8 *ib.* 152.

On the other hand, many able decisions discard this distinction, and hold that, when chancery can rightfully take jurisdiction of the subject, it will give the maker of the bill or note the benefit of all the equities he may have, whether connected with the transaction or not.—Mosteller v. Bost, 7 Iredell's Eq. Cases, 39; Wathen's Ex'r v. Chamberlain, 8 Dana, 164; Watkins v. Worthington, 2 Bland's Ch. 509; Ainsworth v. Ainsworth, 2 Cush. (Miss.) Rep. 145; Blake v. Langdon, 19 Vt. 485; Gay v. Gay, 10 Paige, 369.

Our own court, in the recent case of Wray's Adm'r v. Furniss, 27 Ala. 471, hold the same doctrine. In the case last cited, the question was directly presented; and, although the bill was dismissed for another reason, the opinion still stands as an authority on the turning point of this case. From an authority so recent, we do not feel at liberty to depart, unless upon conviction of fundamental error. Is there any thing in the distinction asserted in the case of the T. C. & D. R. R. Co. v. Rhodes, *supra*? Will a departure from the *dictum* in that case, overthrow any great conservative principle of the commercial law?

After giving this question a careful consideration, we are unable to perceive any solid foundation on which to rest the distinction asserted. The notes being transferred when *over due*, and consequently *dishonored*, the transferee stands affected with notice of all defences, legal and equitable, which the promisor could have maintained against the payee. The endorsement simply places him in the legal and equitable position in which the payee stood before endorsement. He acquires the rights of the payee, but he takes them with their disabilities. No one will contend that the complainant in this case would not be entitled to relief against the notes, if still held by the payee. He is entitled to the same against the endorsee after dishonor. The insolvency of Barton raises an equity against him; the endorsement of the notes after they were due and dishonored, coupled with the insolvency of Barton before Carroll had notice of the assignment, extend that equity, so as to embrace the endorsee within its remedial power.

We hold, therefore, that Carroll's equity is paramount to Malone's; or, in other words, that Malone has no other equity than that which could have been asserted by Barton. This being the case, his legal title to the notes avails him nothing.

The statute makes bonds, as well as bills and notes, assignable by endorsement. This destroys all distinction between them, affecting this case.—Clay's Digest, p. 381, § 6.

The mortgage executed by Carroll to Malone does not estop him from asserting his equitable right of set-off. See the authorities on the briefs of counsel. See, also, Clements v. Loggins, 2 Ala. 514; Griggs v. Woodruff, 14 Ala. 9; Taylor v. Bates, 5 Cow. 376; Finn & Dulaney v. Barclay, 15 Ala. 626; Ware v. Cowles, 24 Ala. 446.

The decree of the chancellor, dismissing the bill, is reversed, and the cause remanded for further proceedings, not inconsistent with the principles here decided.

RICE, C. J., concurs in this opinion.

WALKER, J.—I respectfully dissent from the decision of the majority of the court, on the main question of set-off in this case. I think the set-off against Malone, who acquired the legal title to the note mentioned in the pleadings by endorsement, and without notice of Carroll's equity, which grows out of an independent transaction, ought not to be allowed. In my opinion, all the elementary books, all the English decisions, and the principle laid down in all of our own decisions on the subject, except that of Wray v. Furniss, 27 Ala. 471, and many (if not most) of the American authorities, which pertain to the question, as well as the policy of the law as to the transfer of notes, are opposed to the conclusions attained by my brothers. I do not regard the decision in Wray v. Furniss, *supra*, as an authority in favor of the position of the majority of the court. In my judgment, this court ought not to depart from the principle laid down in the case of the T. C. & D. R. R. Co. v. Rhodes, 8 Ala. 206. I express an opinion in this case, differing from that of my brethren, with reluctance, and only in obedience to my sense of duty.

O'REILLY'S ADM'R vs. BRADY ET AL.

[BILL IN EQUITY FOR SETTLEMENT OF PARTNERSHIP ACCOUNTS.]

1. *Exceptions to master's report must be specific.*—An exception to a master's report, in stating an account, is in the nature of a special demurrer, and must specify particularly the error complained of: if it is directed to a particular portion of the report, including several distinct items, and is bad in part, it may be overruled *in toto*.
2. *Allowance to surviving partner for expenses in settling business of partnership.*—Where the business of a trading partnership is continued for a considerable length of time after the death of one of the partners, whose personal representative, in seeking a settlement of the partnership accounts in equity, elect to have a report and decree for the profits which accrued during that time, the surviving partner is entitled, at least, to an allowance and deduction for "tavern bills and other expenses incurred in the adjustment and settling up" of the affairs of the partnership.

APPEAL from the Chancery Court of Franklin.

Heard before the Hon. A. J. WALKER.

The facts of this case, as stated in the opinion of the court, were as follows: The bill was filed by the administrator of Philip O'Reilly, a deceased partner, against Michael B. Brady and Dennis C. Tynan, the two surviving partners, for an account and settlement of the affairs of the partnership. Among other things, the answer of Brady states, that the partnership was formed on the first of June, 1842, for the purpose of trading in and selling goods and groceries; that complainant's intestate died in October, 1842; that the firm "continued until the 31st December, 1843, when it was dissolved"; that after the death of said intestate, Brady had the trouble, labor and *expense* of closing up the business of the firm for a term of five or six years; that the firm had transacted business on the credit system; that the business yielded profits to a considerable amount, and to a great extent consisted in dealing in groceries; that the demands, dues, and accounts belonging to the firm, were scattered over many counties and States, and a wide extent of country; that the winding up and closing of the business was necessarily at-

tended with much labor, *expense*, and consumption of time; that the other surviving partner, Tynan, had left the country, and emigrated to Texas, whence he did not return; and that said Brady had been put to *great expense*, labor, and trouble, in and about the business of the firm, as stated, after its dissolution. These several matters, thus stated in Brady's answer, are responsive to the bill, and are therefore evidence for him. Immediately after stating them, and in direct connection with them, he proceeds in his answer as follows, "And he insists that a fair compensation should be allowed him, for *thus having attended to the business through a lapse of six years*, and passing money through his hands to the said O'Reilly's administrator, to the amount of about \$5,788 22, as appears by the several vouchers and receipts and documents referred to, Nos. 2, 3, and 4. He asks what shall be deemed right and fair in *the premises*."

In a statement of the assets and liabilities of the firm, marked "Exhibit B," and forming part of his answer, he includes among its liabilities the following :

"Add amount due for office rent, from 1st Jan.,

1844, \$75 *per annum*, 4 years..... \$300 00

Amount due to Michael B. Brady, for services in

collecting, *use of horse, tavern bills*, and various

other expenses incurred, including services in the

adjustment and settling up of this firm, at \$800

per annum for 4 years, (\$3,200).....\$3,200 00"

The order of reference did not direct the register to report the evidence, but merely "to state an account between the parties."

The report of the register, so far as the foregoing charge of \$3,500 against the firm is concerned, is as follows: "The complainant sought to disallow the surviving partner, M. B. Brady, his charge of \$3,500, for office rent and personal services *in attending to the business of the firm*, and winding up the same, *as shown in exhibit B*. Proof was dispensed with as to its amount, and the question raised, whether he was entitled, in law, to make such a charge. The master allowed it, upon the ground, *that the firm business continued for a long time after the death of P. O'Reilly; one of the members, and his representatives claiming the profits that accrued to the firm*

during that time. If the firm had closed immediately upon the death of one of the members, the master would have disallowed any compensation for the services (in) winding up the firm; *but in this case, the dividends here reported were made, admitting the charge to be one of the liabilities of the firm.*"

The report does not purport to state the evidence which was adduced before the register; and the only exception which was taken to it, is the following: "The said complainant excepts to the report made by the register and master of this court in this case, and for cause of exception sets down the following: It will be seen by 'exhibit B' to the respondent Brady's answer, which purports to be a statement of the account of profits of said firm of Brady, Tynan & Co., that the said Brady has claimed, as a part of the expenses of said firm, *thirty-five hundred dollars* for office rent, and his personal services in winding up the unsettled business of said firm after its dissolution, by the death of Philip O'Reilly, complainant's intestate. Complainant would here also ask your Honor to refer to said Brady's answer upon this subject, in which he asks compensation for his individual services in winding up the business, &c. *The said sum of \$3,500, as claimed as aforesaid by Brady*, has been allowed by the register and master, as shown by his report, and for *its allowance* complainant *excepts to said report*, and asks that the same may be corrected by your Honor, as illegal and unjust."

The chancellor overruled this exception, and confirmed the report; and his action in this respect is the only matter embraced by the assignments of error.

J. B. MOORE and JOHN A. NOOE, for the appellant:

1. The allegations and proof must correspond. Relief can no more be granted upon proof without the necessary allegations, than upon allegations without proof; and this rule is applicable to both bill and answer.—16 Ala. 797; 11 *ib.* 963; 6 *ib.* 518; 1 *ib.* 333; 3 *ib.* 426; 9 *ib.* 988; 3 Porter, 470; 4 *ib.* 297; 12 Vesey, 477; 2 Dan. Ch. Pr. 411. An order of reference must be founded upon, and cannot be made more extensive than, the pleadings and proof.—3 Johns. Ch. 587. The master should only hear evidence upon matters of account included in the pleadings.—16 Ala. 621. The rules of evi-

dence, which govern courts of common law, regulate proceedings in the master's office.—2 Barb. Ch. Pr. 493. Where the charges in the pleadings are specific, the inquiry is not open beyond the special matters charged.—3 Johns. Ch. 587. Evidence cannot be introduced of a matter not in issue, and the objection may be raised for the first time in this court.—7 Paige, 490; 6 Johns. Ch. 567. Brady based his claim for compensation upon the ground of his "trouble in winding up the partnership"; while the master allowed it on the ground of "his continuing the trade after O'Reilly's death",—a fact which was not in issue. To have entitled him to compensation for carrying on the trade, he should have made the claim for it, and proved the value of such services.—13 Pet. 371; 3 Johns. Ch. 81.

2. The complainant's exception is not too general. It points out the error complained of; and this is all that is necessary.—8 Ala. 804; 13 Peters, 369. Even a general objection would entitle the party to the correction of error apparent on the record, as is the case here.—13 Peters, 369. When items are excepted to, it is the master's duty to certify the evidence by which the disputed items are sustained.—8 Ala. 805. As he has not done so in this case, and as the report is deficient in the facts necessary to sustain the decree, it should have been set aside, even without an exception.—*Lang v. Brown*, 21 Ala. 190.

3. A surviving partner, in the absence of an express agreement, is not entitled to compensation for continuing the trade after the death of his co-partner.—*Gow on Partnership*, 381; *Collyer Do.*, 123; 1 Paige, 398; 1 Johns. 151; 3 *ib.* 431; 1 Vesey & B. 170; 1 Porter, 148. Without a stipulation to that effect, a partner is not entitled to compensation for conducting the trade, or for settling up the business, beyond his share of the profits.—2 Iredell's Eq. 420; 2 Dev. Eq. 481; 3 Johns. Ch. 431; 7 Paige, 488; 1 Hoff. Ch. 68; 1 Harr. 401; 2 Dev. & Bat. Eq. 123; 8 Dana, 214. It is the duty of the surviving partner, immediately after a dissolution, to settle up the business. If he continue the trade, it is at his own risk; and he will be liable to account for the profits, besides bearing all the losses.—*Story on Partnership*, § 343; *Collyer*

Do., 79; 1 Hare, 253; 15 Vesey, 218; 5 *ib.* 539; 3 Kent's Com. 64; Equity Cases, by Parsons, 281.

4. The master's report cannot be sustained on the ground of compensation to the surviving partner for winding up the affairs of the partnership, for he was not entitled to compensation for such services.—1 Porter, 148; 2 Bouv. Inst. 133; 1 B. Monroe, 179; 2 Hill's Ch. 549; Riley's Ch. Cases, 166; 17 Pick. 519; 1 Knapp, 312.

5. The report is erroneous on its face. It is deficient in the facts necessary to sustain the decree, and should have been set aside, even without exception.—21 Ala. 192; *ib.* 433; 7 *ib.* 827; 3 Johns. Ch. 77; 6 Paige, 127; 10 *ib.* 496; 3 Dess. 584; 6 Vesey, 230; 9 Porter, 79; 2 Smith's Ch. Pr. 370.

6. The decree is erroneous, because it embraces matters not in issue between the parties, and not alleged in the pleadings.—16 Ala. 793; 20 *ib.* 768; 6 Johns. Ch. 564; Gresley's Eq. Ev. 230; Story's Equity Pleadings, § 257.

WILLIAM COOPER, *contra*, contended,—

1. That the defendant's claim for compensation, under the circumstances of the case, was properly allowed.—4 Cond. Eng. Ch. 133, 141; Collyer on Partnership, § 328; Story on Partnership, §§ 343, 349, and notes; 16 Vermont, 613; 15 Mass. 120; 2 Russ. 345; 1 Hare, 253, 265.

2. That the exception was too general and indefinite, and being certainly bad in part, was properly overruled *in toto*.—Darrington v. Borland, 3 Porter, 45; Wilkes v. Rogers, 6 Johns. 591; Alexander v. Alexander, 8 Ala. 797; Kirkman v. Vanlier, 7 *ib.* 217; Hodges v. Salmons, 1 Cox, 249; 1 Y. & Coll. 114; Green v. Weaver, 2 Cond. Eng. Ch. 204; 1 Simons, 404; 4 Paige, 382; *ib.* 427; 21 Ala. 433; 2 Smith's Ch. Pr. 372.

RICE, C. J. (After stating the facts).—An exception to the report of a master is in the nature of a special demurrer, and the party objecting must put his finger on the error; otherwise, the part not excepted to may be taken as admitted.—Darrington v. Borland, 3 Porter's Rep. 9; Story v. Livingston, 13 Peter's R. 359; Royall v. McKenzie, 25 Ala. Rep. 364.

When the only exception to a report is directed to a particular portion of it, which includes several distinct items or matters; and the exception does not point to any one of them in particular, but is leveled at all of them in mass, it may be overruled, unless the report appears to be wrong as to every one of them.—*Royall v. McKenzie, supra*; 2 Daniel's Ch. Pr. 1496, and notes.

Conceding that the chancellor may allow an exception in part, and that he may direct the master to review his report upon grounds independent of those laid in the exception; (2 Daniel's Ch. Pr. 1496, 1501; *Hoare v. Johnston*, 4 M. & C. 127;) yet he is not *bound* to sustain an exception in part, which is bad in part. He commits no error in overruling such exception *in toto*, and confirming the report, in the absence of any other exception.

It is unnecessary, in this case, to decide whether, where the partnership has continued for some length of time after the death of a partner, the survivor should be allowed any thing for his skill and personal services in continuing the business, or in winding up and settling it. However that may be, we consider it clear that, where a trading partnership and its business continued for a considerable length of time after the death of a partner, and his representatives elected to have a report and decree for the profits which accrued during that time, the surviving partner is entitled, at least, to an allowance and deduction, for "tavern bills", and "*other expenses incurred*" "in the adjustment and settling up" of the affairs of the partnership.—*Collyer on Partnership*, §§ 199, 327, 328, and note 1.

As there is nothing in the record which contradicts either the responsive statements of Brady's answer hereinabove set forth, or the report of the master, they must be taken as true; and taking them as true, the master was authorized, from what appears in them, under the pleadings, to allow to Brady at least a part of his said charge of \$3,500—to-wit, *the expenses incurred by him in adjusting and settling up the partnership affairs*.

Whether any other part of the charge of \$3,500 could properly have been allowed, it is not material to inquire; for, as the exception of complainant was leveled at that charge

Woosley v. Memphis and Charleston Railroad Company.

as a whole, and is clearly bad as to part of it, the chancellor was authorized to treat it as bad *in toto*, and to confirm the report,—that being the only exception to it.

The decree is affirmed, at the costs of the appellant.

WOOSLEY vs. MEMPHIS AND CHARLESTON RAILROAD COMPANY.

[JUDGMENT BY DEFAULT AGAINST DELINQUENT STOCKHOLDER IN RAILROAD CO.]

1. *When office judgment for want of plea may be entered.*—Under the provisions of the Code, in connection with the rules of practice in the circuit courts, (Code, §§ 2258–60; App. 714, 9th and 10th rules,) if the defendant fails to plead within the prescribed time, the plaintiff may have the default entered on the docket in vacation, at any time before pleas are filed, and claim the benefit thereof at the ensuing term of the court; but the defendant may plead at any time before the default is entered against him.
2. *What is sufficient entry of office judgment.*—An entry on the docket, in vacation, after the time for pleading has expired, in these words, "Plaintiff claims judgment against defendant for want of a plea," signed by the plaintiff's attorneys, with the date attached, and attested by the clerk, is not a sufficient entry of the default; nor is it sufficient to sustain a judgment by default at the ensuing term, after pleas are filed, although proof is made to the court that no pleas were filed when it was entered.

APPEAL from the Circuit Court of Jackson.

Tried before the Hon. THOMAS A. WALKER.

This action was brought by the appellee, to recover of William Woosley, the appellant, the amount of his unpaid subscription to the capital stock of said railroad company. The summons was issued on the 5th September, 1854, and was returnable to the ensuing September term of the court; but the summons was not executed twenty days before the return day, and the cause therefore stood for trial at the next term. At the March term, 1855, a judgment by default was rendered against the defendant, who was present by his attorneys, and excepted to the rulings of the court; and the

rendition of this judgment is one of the matters now assigned as error.

"On the trial of the cause", as the bill of exceptions states, "the plaintiff read to the court an entry on the appearance docket, opposite to this cause, of a writing made and signed by plaintiff's attorneys, and attested by the clerk, in the following words and figures: 'Plaintiff claims judgment against defendant for want of a plea, Nov. 7, 1854'; and then showed that no plea had been filed in the cause at the time plaintiff claimed said office judgment; and now moves the court to confirm said office judgment, and to render judgment final. This motion the defendant opposed, and showed that he had filed pleas in this cause on the 29th day of January, 1855, and that they are still on file. But the court overruled defendant's said objection, and rendered judgment by default against him; saying, that if defendant desired it, he would hereafter be heard, on motion, founded on affidavit of merits and sufficient excuse, to set aside said judgment. The defendant then moved the court to set aside said judgment, but did not produce or offer any affidavit whatever; which motion was overruled by the court. To these decisions of the court, in overruling the defendant's objection and motion, and in confirming said office judgment, the defendant excepted."

ROBINSON & JONES, for the appellant, contended that the judgment by default could not be sustained, because,—

1. The defendant had filed his pleas, which were still on file and undisposed of, and he was present, by his attorneys, insisting on them. The pleas had thus become a part of the record, and the court was bound to notice and dispose of them; it could not disregard them, or render a judgment by default until they were disposed of.

2. The office judgment is no answer to this. There is no provision in the Code which authorizes such judgments; the old statute (Clay's Digest, 325, § 72) not having been carried into the Code. The 9th rule of practice authorizes defaults to be entered on the docket in vacation, which shall relate to the preceding term, and of which advantage may be taken at the succeeding term. But the entry in this case cannot be sustained, either as an office judgment, or as an entry of

default; because it is the mere act of the plaintiff's attorney, and not the act of the clerk. The rule does not say that the plaintiff may claim a judgment, but that a default may be entered. The entry must show that the default exists, and specify all the elements of a default; such as, that the time for pleading has expired, that no plea has been filed, and that the plaintiff claims the default for want of a plea. The remedy is entirely statutory, and must be strictly pursued; and the record itself must show every requisite to sustain the jurisdiction.—*Bettis v. Taylor*, 8 Porter, 564; *Curry v. Bank of Mobile*, 8 *ib.* 372; *Zurcher v. Magee*, 2 Ala. 253; 1 Stew. & P. 187. The entry, if good at all, must have been good when made, and cannot be aided by proof subsequently offered.

3. If the entry were valid, either as an office judgment or as an entry of default, it was wholly inoperative until confirmed by the court.—*Jones v. Merrill*, 1 Ala. 217. Therefore, the defendant was not precluded from filing his pleas, and the court had the power, at least, to leave them on file; and the ends of justice required that it should be done. No injustice could be done by allowing the pleas, while their rejection might work irreparable injury.

C. C. & J. W. CLAY, *contra*, made these points:

1. The defendant having failed to plead within the time enlarged by the order of the court, the plaintiff entered the default on the docket, and claimed advantage of it at the next term. This was authorized by the 9th rule of practice; and the court, therefore, properly confirmed the office judgment, notwithstanding the defendant's objection and motion to set it aside.—*Sally v. Gooden*, 5 Ala. 78; 1 Arch. Prac. 134, 136.

2. The refusal to set aside the judgment by default is not revisable on error.—5 Ala. 80; 2 Arch. Prac. 30; *Ewing v. Peck & Clark*, 17 Ala. R. 341; *Acre v. Ross*, 3 Stew. 288; *Hogan v. Alston*, 9 Ala. R. 627; 1 *Caines*, 6, 120; 4 *How. (Miss.)* 282; 6 *Johns.* 130; 1 *Barbour*, 31; 10 *Peters*, 286; 21 *Wendell*, 51; 9 *Porter*, 235; 11 Ala. R. 272; 14 *ib.* 227; 18 *ib.* 93; 25 *ib.* 330.

3. The pleas were irregularly filed, and the court was not

bound to notice them.—Appendix to Code, 715, 10th-rule; *Flanders v. Whittaker*, 13 Illinois, 707.

WALKER, J.—We think the fair construction of this bill of exceptions is, that the judgment by default was predicated upon the facts set forth in the bill of exceptions; and it has been so treated in the argument of counsel. At the time when the judgment by default was rendered, the defendant's pleas were on file, and he was in court, by his attorneys, opposing it; and the judgment was therefore erroneous, unless it was authorized by our statute and rules of practice.

Sections 2258, 2259, and 2260 of the Code prescribe the time within which the defendant is required to plead. The rules of practice contain the following provisions: "Defaults may be entered on the docket in vacation, which shall relate to the preceding term, and advantage thereof may be claimed at the next term." "After a default has been duly entered, the party claiming the benefit thereof shall not be bound to receive any plea or pleading of the party so in default."—Appendix to the Code, p. 714, §§ 9, 10.

Under the sections of the Code referred to, and the rules of practice above copied, a plaintiff may, during vacation, have the default of the defendant, who has not pleaded, (the time for him to plead having passed,) entered upon the docket; and he will not be bound, without an order of court, to receive a plea at the next term of the court, provided he then claims the advantage of the default entered in vacation. If, then, the default of the defendant in this case was entered in the manner contemplated by the rules of practice, it is clear that the court did not err in rendering the judgment by default; for, at the time when it is alleged default was claimed, the defendant had not pleaded, and the time for him to plead, even as extended by an order of court, had passed. If the default was not entered in vacation, as contemplated in the rules of practice, then the judgment by default was erroneous; because the defendant pleaded, before the judgment by default was rendered. We think that the effect of the statute and rules of practice, when construed in reference to each other, is, that a defendant may plead at any time before the default is entered; and, on the other hand, the

plaintiff may have the default entered in vacation, at any time after the failure of the defendant to plead within the time prescribed by law, and before pleas are filed.

That which is considered the entry of a default in vacation, is a writing upon the docket of the cause of the preceding term, in the following words: "Plaintiff claims judgment against defendant for want of a plea, Nov. 7, 1854", which is signed by the counsel of the plaintiff, and attested by the clerk. Conceding, for the purpose of the argument, that the entry upon the docket, which is copied above, is, although signed by the plaintiff's attorneys, made the act of the clerk by his attestation of it, it is clear that the words themselves do not amount to the entry of a default. The entry is not that a default had taken place, or that the defendant had failed to plead, but that plaintiff claimed judgment for want of a plea. The entry is a statement of the claim set up by the plaintiff, and not of the fact that there existed a default. It is true that it was shown to the court, at the time when the judgment by default was rendered, that the defendant had not pleaded when the entry was made upon the docket; but that can not sustain the judgment, because it is only the fact that an entry of the default was made before the defendant had pleaded which will authorize a judgment by default after pleas are filed. The entire proceeding is statutory, and must be in strict conformity to the statute and rules of practice, under which it is had.—Curry v. Bank of Mobile, 8 Porter, 372.

After the judgment by default was rendered, a writ of inquiry was executed, and many questions upon the introduction of evidence were raised, and several questions were also raised upon a motion in arrest of judgment; upon all of which assignments of error are based. We are not at all certain that, upon another trial of the cause, the same questions will arise; and we do not now deem it necessary, or proper, to pass upon them. The pleas of the defendant were not passed upon by the court below, and were not regarded or treated as pleas in the cause. The sufficiency of those pleas is therefore not a question before us.

For the error of the court below in rendering the judgment by default, its judgment is reversed, and the cause is remanded.

DESLONDE & JAMES vs. CARTER ET AL.

[MOTION TO DISMISS APPEAL.]

1. *Proper parties to appeal.*—An appeal from a joint judgment against several defendants, though sued out by one of the defendants, must be in the names of all; but it is not necessary that the appeal bond should, in so many words, recite that fact, if, upon a fair construction of its language, it shows that the whole case is brought up.
2. *Sufficiency of appeal bond.*—A joint judgment having been rendered against D. and J., the two proponents of a will, D. alone sued out an appeal; and the condition of the appeal bond was as follows: "Whereas the above bound D. hath applied for and obtained an appeal, in a certain suit heretofore pending and determined", &c., "in which the said C. and E. [obligees] are defendants, and said D. and J. are plaintiffs, in the matter of the contest of the will of J. D., deceased, returnable", &c.: "Now, if the said D. shall prosecute said appeal to effect, and pay and satisfy the judgment which shall be rendered in said cause", &c. *Held*, that the bond was sufficient.

APPEAL from the Court of Probate of Clarke.

In the matter of the last will and testament of John Darlington, deceased, which was propounded for probate by Edmund A. Deslonde and Robert D. James, as executors, and was resisted by the appellees. An issue being made up, and submitted to a jury, who returned a verdict against the validity of the will, the court rendered judgment against "the plaintiffs, or proponents", for the costs of their witnesses, and disallowed the probate of the will. The minute entry then proceeds as follows: "Thereupon came Edmund A. Deslonde, one of the proponents of said will, and craved an appeal, in open court, to the next term of the supreme court, which is granted; and thereupon said Deslonde entered into bond, with F. A. Cowles and Wm. S. Trigg, security for the appeal, in the sum of \$200." The condition of the appeal bond is as follows: "The condition of this obligation is such, that whereas the above bound Edmund A. Deslonde hath applied for and obtained an appeal, in a certain suit heretofore pending and determined in the probate court of Clarke county, in which the said John T. Carter and Eliza,

his wife, and Robert Darrington, are defendants, and said Deslonde and Robert D. James are plaintiffs, in the matter of the contest of the will of John Darrington, deceased, returnable to the next term of the supreme court, at Montgomery, on the first Monday in January, 1856: Now, if the said Deslonde shall prosecute said appeal to effect, and pay and satisfy the judgment which shall be rendered in said cause by said supreme court, then this obligation to be void."

On these facts a motion to dismiss the appeal was made.

WM. P. CHILTON and GEO. W. GAYLE, for the motion :

1. James was one of the proponents of the will, and is one of the defendants to the judgment; while the appeal is prosecuted by Deslonde alone, and is therefore fatally defective.—*Moore v. McGuire*, 26 Ala. 461; *Williams v. The State*, *ib.* 85; *Dumas v. Hunter*, at the present term; *Wiswell v. Munroe*, 4 Ala. 10; *Savage & Darrington v. Walsh & Emanuel*, 24 *ib.* 293; *Portis v. Carroll*, 4 Porter, 332; *Swift v. Hill*, 1 *ib.* 277; *Webster v. Yancey*, Minor, 183; *Adams v. Robinson*, *ib.* 285; *Caller v. Brittain*, *ib.* 27; *Jameson v. Colburn*, 1 Stew. & P. 253; *Billinslea v. Abercrombie*, 2 *ib.* 24; *Whitaker v. Patton*, 1 Porter, 9.

2. If it be said that James is not a party to the judgment, then the appeal bond is fatally defective, since it describes a judgment against Deslonde and James.—*Williams v. The State*, 26 Ala. 85.

3. An amendment of the appeal cannot be allowed, for there is no statute to authorize it. The sureties have a right to stand on the terms of their contract. Besides, the court must have jurisdiction before it can amend: it cannot give itself jurisdiction by an amendment.

E. S. DARGAN and F. S. BLOUNT, *contra*:

1. The whole record shows that James was not a party to the proceedings in the court below, and that the insertion of his name in the judgment entry is a mere clerical misprision, which is amendable by the record.—*Smith v. Redus*, 9 Ala. 99; *Hood & Stinnett v. Branch Bank*, *ib.* 335; *Drummond v. Wright*, 1 *ib.* 205; *Patterson v. Burnett*, 6 *ib.* 844; *Moody v. Keener*, 9 Porter, 252; 24 Miss.

2. The sufficiency of the bond depends upon the question, whether it is a valid security for the costs. That it is a substantial compliance with the statute, see *Williams v. McConico*, 27 Ala. 572; and that it is, at all events, valid as a common-law bond, see *Whitsett v. Womack*, 8 Ala. 466; *Meredith v. Richardson*, 10 *ib.* 828.

STONE, J.—Motion in this case is made by the appellees to dismiss the appeal. The ground urged is, that the appeal bond does not conform to the case in the court below,—and that therefore there is no proper security for costs.

In *Moore v. McGuire*, 26 Ala. 461, the rule is laid down, that “when there are several defendants, against whom a joint judgment is rendered, or a joint duty imposed by the decree of the court, they can not sue out separate appeals.” This is a very recent exposition of the rule, and we are satisfied with it. Under its authority, if one defendant, thus circumstanced, sue out a separate appeal, and the objection be taken, the court will dismiss the appeal. The same case declares the proper rule of practice in such cases; namely, that the appeal shall be taken in the names of all the defendants. In the case of *Moore v. McGuire*, *supra*, the bond was held insufficient, because its condition was, that the *one party* who gave it should prosecute *his* appeal.

To render the appeal effectual, it is not necessary that the bond shall, in so many words, recite that the *one defendant* to the joint judgment sues out the appeal *in the names of all*. It is sufficient, if, upon a fair construction of its language, this is made to appear. In other words, if the bond shows that the *whole case* is brought up, the appeal will be entertained.

The present bond brings up the *whole case*. The decree of the probate court is against Edmund A. Deslonde and Robert D. James; and the bond of Deslonde, although not joined in by James, nowhere indicates that it is the individual appeal of Deslonde. The fault of the argument, in favor of the motion to dismiss, lies in the supposition that Deslonde's bond is *his* individual appeal. The case of *Savage & Darrington v. Walsh & Emanuel*, 24 Ala. 293, presented the precise point here raised; and the motion in that case was overruled,

on the grounds assigned for this opinion. The report of the case contains no statement of the condition of the bond. Looking into the record, we find no substantial difference between the bond and certificate in that case and the same papers found in this record.

Motion refused.

BAKER vs. GREGORY AND WIFE.

[BILL IN EQUITY TO ENFORCE CHARGE AGAINST WIFE'S SEPARATE ESTATE.].

1. *What consideration will support promise to pay by infant after coming of age.*—If a stranger, without obligation, expends his own funds in maintaining and educating an orphan child, who meanwhile becomes entitled to a large estate, out of which no allowance for her maintenance or education is applied for or made, this is a sufficient consideration to support an express promise on her part, after coming of age, to repay him the amount so expended; and if such expenditure is made at the request of her brother-in-law, who thereby becomes liable for its amount, this liability on his part is a sufficient consideration to support an express promise on her part, after coming of age, to indemnify him against any loss he might thereby sustain.
2. *What will create charge upon wife's separate estate.*—If an adult married woman, having a separate estate secured to her by ante-nuptial contract, without any restriction upon her power to charge or dispose of it, authorize her husband, as her acting trustee, with the intention thereby to charge her separate estate, to execute a note to a third person, for the amount expended by him, without obligation, but at the request of her brother-in-law who afterwards became her husband, in maintaining and educating her while a poor orphan child; and her husband accordingly executes the note, signing his name, with the addition of the words "acting trustee"; and the note is then accepted by the payee, as a charge upon her separate estate,—a court of equity will enforce it as such.
3. *Such charge transferrable.*—A promissory note, which was executed under such circumstances as to constitute it a charge upon the separate estate of a married woman, may be enforced in equity by a transferee or endorsee against her estate.
4. *Parol evidence admissible to show consideration of note.*—Where a promissory note is signed by the husband, with the addition of the words "acting trustee," parol evidence is admissible to show that its consideration and purpose, with the character of the transaction, constitute it a charge on the separate estate of his wife.

5. *Contract of wife having separate estate, effect of.*—Although the wife's promissory note, even when she has a separate estate, creates no personal liability on her; yet, if there is no restriction on her power to charge or dispose of it, she may charge her estate with the payment of her husband's debt, by any promise or contract which, if she were sole and unmarried, would bind her personally.

APPEAL from the Chancery Court of Lowndes.

Heard before the Hon. WADE KEYES.

This bill was filed by Theophilus L. Baker against Ossian Gregory and Susan, his wife; and its material allegations, as contained in the original and amended bills, are as follows: That complainant recovered a judgment against said Ossian Gregory, in the circuit court of Butler, at its September term, 1850, for \$1,231 70, besides costs, on which an execution was duly issued, and returned "no property found"; that this judgment was founded on a promissory note, dated October 19, 1847, and signed by said Ossian Gregory, with the addition of the words "acting trustee", of the following tenor: "Two years after date, I promise to pay Samuel H. Peck, or order, nine hundred and ninety-five and 91-100 dollars, for value received (the same for expenses paid by him for board and education of Susan Breithaupt previous to her marriage,) payable in specie, or its equivalent in Mobile, with interest from date"; that this note came to the possession of complainant, for valuable consideration, before maturity, by endorsement from Henry P. Peck, to whom it had been endorsed by said Samuel H. Peck; that this note was given by said Ossian Gregory, while acting as trustee for his said wife, in consideration of an indebtedness on her part to said Samuel H. Peck, for necessities furnished by him in her maintenance and education while an infant, and before her intermarriage with said Ossian; that after said Susan became of lawful age, and after her intermarriage with said Ossian, she repeatedly promised to pay said debt; that she acknowledged, at the time said note was executed, that the debt for which it was given was created for her benefit, and promised that it should be paid out of her separate estate; that this promise was frequently repeated after complainant became the owner and holder of said note; that said Ossian Gregory

is still wholly insolvent; and that Mrs. Gregory has a large and valuable separate estate, which is secured to her by ante-nuptial contract, of which her said husband is trustee under appointment from the chancery court, and which is chargeable in equity with the payment of said debt. The prayer of the bill is, that Mrs. Gregory's separate estate, or so much thereof as may be necessary for that purpose, may be condemned to the satisfaction of said debt; and the prayer for other and further relief is added:

The note, which is appended as an exhibit to the bill, is signed by "Ossian Gregory, acting trustee," and bears an endorsement in these words: "Pay the within to Theophilus L. Baker, without recourse", with the names of Samuel H. Peck and Henry P. Peck underwritten.

The defendants filed joint answers to the original and amended bills. They admit the recovery of the judgment against said Ossian Gregory, and the issue and return of execution thereon, as alleged in the bill; that said judgment was founded on the note exhibited with the bill, which was executed by said Ossian; that Mrs. Gregory has a separate estate, secured to her by ante-nuptial contract; that said Ossian is now her trustee, under appointment from the chancery court; and that he is insolvent. In reference to the alleged consideration of said note, they allege that said Susan, while yet an infant, was sent by said Ossian, who had married her sister, to the house of said Samuel Peck, to be raised and educated; that said Peck was then wealthy, and did not intend to make any charge for his care and maintenance of said Susan; that he afterwards represented that he had met with a reverse of fortune, and urged said Ossian, after his inter-marriage with said Susan, to execute his note as her acting trustee, for the sums which he claimed to have expended on her account; that said Peck was then informed that said Ossian was not the trustee of his wife, and that another person was her trustee, and that he took the note with the knowledge of these facts. They deny that Mrs. Gregory ever promised to pay the note, and insist that it is not chargeable upon her separate estate. They allege, that said Peck is indebted to Mrs. Gregory's separate estate; that he is utterly insolvent; and that the alleged transfer of the

note was wholly without consideration, and was intended to deprive them of the benefit of their set-off against said Peck. They plead the statute of limitations, and demur to the bill for want of equity.

It is unnecessary to notice the evidence in the cause.

On final hearing, on pleadings and proof, the chancellor held, that the right to subject Mrs. Gregory's separate estate to the payment of the debt, even admitting that Peck might have enforced it, did not pass to the complainant by the transfer of the note. He therefore dismissed the bill; and his decree is now assigned as error.

WATTS, JUDGE & JACKSON, for the appellant :

1. The bill seeks relief on the ground that Mrs. Gregory has a separate estate, and that she has created a charge upon it, by causing the note to be given upon which the judgment at law was recovered, and by repeatedly promising, both before and after it was transferred, to pay it. It is well settled, in this State, that a married woman, so far as respects her separate estate, is to be considered as a *feme sole*, and that the contracting of a debt by her is *prima facie* evidence of her intention to charge her separate estate with its payment.—Bradford and Wife v. Greenway, Henry & Smith, 17 Ala. 797; Collins v. Lavenberg & Co., 19 *ib.* 682. This court, indeed, has held, that "all the debts of a married woman should create a charge upon her separate estate, as well those where the promise to pay is implied by law, as those evidenced by bond, note, or bill of exchange"; and this is said to be the tendency of the modern English doctrine.—Collins v. Rudolph, 19 Ala. 617.

2. Mrs. Gregory, it is true, did not sign the note herself; but she caused it to be signed by her husband, as her "acting trustee"; and had it expressed upon its face that it was given in consideration of board, maintenance and tuition which had been furnished to her, for the express purpose of charging her separate estate with its payment, as she afterwards acknowledged; and promised, both at the time of its execution and afterwards, that it should be paid out of her separate estate. This, surely, is sufficient to create a charge upon her separate estate, if there was any consideration for the note itself, and for the promises to pay it.

3. Was there any consideration for the note, and for the promises to pay it, which would make them binding? Although Mrs. Gregory was an infant, when the expenditures for which the note was given were incurred; yet, when she arrived at maturity, and became possessed of a large separate estate, there was certainly a high moral consideration resting on her, to reimburse her benefactor for the moneys which he had expended for her. This moral obligation was feelingly acknowledged by her, on more than one occasion; and it cannot be necessary to cite authority, to show that a moral obligation to pay a debt is a sufficient consideration to support an express promise to pay it.

4. The chancellor dismissed the bill upon the idea, that the right to subject Mrs. Gregory's separate estate to the payment of the debt did not pass to the complainant by the transfer of the note; or, in other words, that a charge upon a married woman's separate estate, created by express words, is not legally susceptible of transfer, and cannot be enforced by any other person than the one in whose favor the charge was created. There is no reason, or principle, to justify such a conclusion. The chancellor must have been misled by the case of *Hall's Executors v. Click*, 5 Ala. 363; in which it was decided, that a vendor's lien does not pass to an assignee of the note given for the purchase money. But the principle applicable to a vendor's lien for unpaid purchase money, cannot be made to apply to a case like the present. The promissory note of a married woman, having a separate estate, is not a different thing from the charge upon her separate estate: they are one and the same thing. At law, the note is void; but equity considers it, in so many words, as a charge upon her separate estate. If the note is transferred, therefore, the charge upon her separate estate is transferred, and nothing else. The note cannot pass by the transfer, while the charge remains, since they are one and indivisible. The case of *Hall's Executors v. Click*, however, has been overruled by the more recent cases of *Roper v. McCook*, 7 Ala. 318, and *Plowman & McLean v. Riddle*, 14 *ib.* 169.

5. The evidence shows, that the charge on Mrs. Gregory's separate estate was intended to be transferred, with the note,

and that she promised to pay the debt with a knowledge of the transfer. A vendor's lien for the unpaid purchase money may be transferred with the note, if that is the intention of the parties.—7 Ala. R. 318. If, then, there is any analogy between that case and this, the charge on the separate estate was transferred with the note.

WILLIAMS & COCKE, contra:

1. The facts sworn to by Samuel H. Peck show no legal liability on Mrs. Gregory, but raise, at most, only a moral obligation, and are insufficient to support even an express promise.—Chitty on Contracts, 46, *et seq.*; Eastwood v. Kenyon, 11 Ad. & El. 438; Beaumont v. Reeve, 8 Q. B. 487; Sims v. Norris & Co., 5 Ala. 42. If this be true, Samuel H. Peck himself could not have enforced a note given by Mrs. Gregory herself, founded on the consideration alleged.

2. If any legal liability was created in favor of said Peck, it was against Ossian Gregory, at whose instance and request the advances were made to Mrs. Gregory, then an infant.

3. The subsequent promise of Mrs. Gregory, to Samuel H. Peck, was to pay the debt of her husband,—his debt by express contract at the time of its creation, and by operation of the marriage. This promise was verbal, and, even if valid as to Peck, cannot enure to the benefit of complainant, who is his transferee without recourse.—5 Ala. 363.

4. The statute of limitations is relied on by Mrs. Gregory; and her promise, during coverture, is not sufficient to remove the bar.—18 Ala. 606.

RICE, C. J.—The expenditure by a stranger, without obligation, of his own funds, for the benefit of an infant bereaved of parents, in maintaining and educating her, is a sufficient consideration to support an express promise, made after she comes of age, to repay him the amount so expended, where, during the continuance of such expenditure and of her infancy, she became entitled to a large estate, out of which no allowance for her maintenance or education was applied for or made.—Cooper v. Martin, 4 East, 77; Southerton v. Whitlock, 2 Strange, 690; Townsend v. Hunt, Cro. Car. 408; Carr v. Wyly, 23 Ala. R. 821; Kenan v. Holloway,

16 Ala. 53; Hatch v. Purcell, 1 Foster's Rep. 544; Harris v. Davis, 1 Ala. Rep. 259; Story on Prom. Notes, § 185; Wennall v. Abney, 3 Bos. & Pul. 249, note (a); Eastwood v. Kenyon, 11 Ad. & Ellis, 438; Whipple v. Dow, 2 Mass. Rep. 415; Atkins v. Banwell, 2 East, 505.

If such expenditure was made at the request of her brother-in-law, and in consequence thereof he had become liable for its amount, the existence of such liability on his part would be a sufficient consideration to support an express promise, made by her after she became of age, to indemnify him against any loss he might thereby sustain.—Carr v. Wyly, *supra*; Bradley v. Pratt, 23 Vermont Rep. 378; Conn v. Coburn, 7 New Hamp. Rep. 368.

If, after such expenditure had been made at the request of her brother-in-law, she married him, but retained her property as her separate estate by an ante-nuptial contract, without any restriction upon her power to charge or dispose of it; and afterwards, and after she came of age, at an interview between her and her husband and the stranger who had made the expenditure, she, with a knowledge of the facts, authorized her husband, as her "acting trustee", to execute to the stranger a note for the amount of the expenditure, payable some one, two or three years after its date, with the intention thereby to charge her separate estate with its payment; and her husband, as her "acting trustee", did thereupon accordingly execute such note, subscribing his name thereto with the description of "acting trustee"; and the stranger thereupon accepted and received it as a charge upon her separate estate,—the note would be treated and enforced by a court of equity as such charge.—1 White & Tudor's Leading Cases in Equity, top pages, 389–399; Ozley v. Ikellheimer, 26 Ala. 332. And the mere fact, that such note had been transferred, or endorsed, would not disable the transferee or endorsee from enforcing it as such charge.—Roper v. McCook, 7 Ala. 318.

Although such note, in the absence of extrinsic evidence, would *prima facie* impose a personal liability upon her husband; yet the fact that his name was subscribed to it, with the description of "acting trustee", would entitle him, or its owner, to show by *parol evidence* the consideration, intention,

and purpose of the note, and the true character of the transaction; and these being thus proved, a court of chancery would not allow the sense and equity of the transaction to be controlled by the mere form of the note.—*Lazarus v. Shearer*, 2 Ala. Rep. 718, and cases therein cited; *Hartwell v. Rice*, 1 Gray's Rep. 587.

Although a married woman may own a separate estate, and may with her own hand sign her name to a note; yet no personal liability can be thereby imposed on her. But a married woman, owning a separate estate, without any restriction upon her power to charge or dispose of it, may charge it with the payment of her husband's debt; and any promise, or contract on her part, will constitute a charge on her separate estate, which would have bound her personally, if she had been sole and unmarried at the time it was made. *Ozley v. Ikelheimer*, 26 Ala. 332, and other authorities cited *supra*; *Hawley v. Bradford*, 9 Paige, 200; *Neimeewicz v. Gahn*, 3 *ib.* 614; *McCroan v. Pope*, 17 Ala. 612.

The foregoing propositions are laid down with a view to the testimony and pleadings in this case; but without any intention to intimate how the case ought to be decided under their application, when it goes back for another trial. The decree of the chancellor shows that he did not decide the case on what we consider its merits; and that he erred in dismissing the bill upon the particular ground on which he did dismiss it. For that error, the decree is reversed, and the cause is remanded. The appellees must pay the costs of this court.

GILLESPIE'S ADM'R vs. BURLESON.

[DETINUE FOR SEVERAL SLAVES BY HUSBAND'S ADMINISTRATOR AGAINST VENDEE OF SURVIVING WIDOW.]

1. *Admission of counsel construed*.—Defendant's attorney admitted, for the purposes of the trial, that the slaves sued for were given to the wife of the

plaintiff's intestate during coverture, and went into their possession under the gift; but with the reservation, that this admission was not intended to preclude the defendant from showing, by legal proof, that the wife, by the terms of the gift, took an estate in said slaves to her sole and separate use, to the exclusion of the marital rights of her said husband, or that said intestate did not have any title to said slaves.' *Held*, that the admission did not preclude the defendant from proving, by the declarations of the donor, of the intestate, and of his wife, that no title vested in the intestate by the gift.

2. *Delivery as part of parol gift.*—While delivery is an indispensable constituent of a parol gift, it is not indispensable that it should be simultaneous with the words of conveyance.
3. *Bill of exceptions construed against appellant.*—Where the bill of exceptions stated, that the slaves sued for were given to the wife of plaintiff's intestate "in the fall of 1833", and that a witness for the defendant, who stated that the slaves were delivered "in 1833", was allowed to testify, against plaintiff's objection, to declarations made by the donor "six or eight months afterwards"; *held*, that it would be presumed on error, in order to sustain the ruling of the primary court, that the slaves were at first delivered on loan, and that therefore the donor's declarations, though made "six or eight months" after the delivery, were prior to the gift "in the fall of 1833."
4. *Admissibility of donor's declarations.*—The declarations of the donor, made previous to the consummation of the gift, but while it was under consideration and discussion by him, and in reference to and contemplation of it, and explanatory of his intention, are competent evidence in a suit involving the title; his declarations at the time of delivery, and in explanation thereof, are also admissible as part of the *res gestæ*; but his declarations after the consummation of the gift are inadmissible, either for the purpose of affecting the gift, or explaining his words or conduct at the time of the gift.
5. *Declarations in disparagement of title, admissibility of.*—The declarations of the husband, while in possession of slaves, to the effect that they are the separate property of his wife, are competent evidence against his administrator, in a suit brought by him against a purchaser from the wife after the death of the husband.
6. *Admissibility of wife's declarations of title.*—Where slaves are in the possession of husband and wife, the wife's assertions of title, when made in the presence of her husband, and acquiesced in by him, are competent evidence against his administrator, in a suit brought by the latter against her vendee; but her assertions of title, when not made in the presence of her husband, nor communicated to him, are not competent evidence for her vendee, unless made while she had possession of the slaves, and explanatory of her possession.
7. *Separate estate may be created by parol.*—A parent may, by a parol gift of slaves to his married daughter, create in her a separate estate, and exclude her husband's marital rights.
8. *What words are insufficient to create separate estate.*—A stipulation, in a gift of slaves to a married woman, that they shall not be liable to her husband's debts, is not, of itself, sufficient to exclude his marital rights and create a separate estate in her.

9. *What does not constitute reduction to possession by husband.*—Where slaves are given by parol to a married woman, who thenceforward, during her husband's life, uniformly asserts title and possession in herself, to her sole and separate use; to which assertions of title her husband uniformly assents,—this is no reduction to possession as husband; but, as between his administrator and a purchaser from his widow after his death, his marital rights never attached.

APPEAL from the Circuit Court of Morgan.

Tried before the Hon. JOHN E. MOORE.

This action was brought by the appellant, as the administrator of James Gillespie, deceased, to recover a negro woman, named Hester, and her children, whom the defendant claimed under a purchase from the widow of said Gillespie. On the trial, as the bill of exceptions states, the plaintiff offered in evidence a written agreement, signed by the defendant's attorneys, in these words: "In this case it is admitted, that plaintiff is the administrator of James Gillespie, deceased, by regular appointment from the probate court; that said Gillespie died in the year 1849; that plaintiff was appointed his administrator in October, 1852; that no administration was had on said estate previous to his appointment; that Hester, one of the slaves sued for, is the slave of that name mentioned in the will of Henry Johnson, as having been given to Lucy Gillespie, and the other slaves are her children, born since the gift; that Hester was given to said Lucy Gillespie, after her marriage with said James Gillespie, about the fall of the year 1833, by said Henry Johnson, who was the father of said Lucy; that said slave went into the possession of Lucy Gillespie under that gift, and there remained until after the death of said James Gillespie,—the said James and Lucy being man and wife, and living together as such. But this admission is not intended to preclude the defendant from showing, by legal evidence, that Lucy Gillespie, by the terms of the gift, took an estate in said slave and her increase to her sole and separate use during her life, to the exclusion of the marital rights of the said James Gillespie; or that said James Gillespie did not have any title to said slaves. It is further admitted, that the defendant was in possession of said slaves at the date of the writ in this case, and has had them in possession since

June 2, 1851, claiming them as his own property; that their value and annual hire are as follows", &c.; "that defendant derived title to said slaves by purchase from said Lucy Gillespie, the widow of plaintiff's intestate, on the 2d June, 1851, after the death of said intestate, and before the grant of administration to plaintiff. The production of the bill of sale, bearing date June 2, 1851, and conveying to said defendant the title of said Lucy Gillespie in said slaves, is waived, and the *bona fides* of said sale is not impeached."

"The defendant", as the bill of exceptions further states, "then introduced John Gillespie as a witness; who testified, that he witnessed the delivery of the slave Hester by Henry Johnson to Lucy Gillespie; that said Henry Johnson, in 1833, delivered said slave to Lucy Gillespie, his daughter, and declared, on the over-night and at the time of delivery the next day, that he was going to give her some property, (alluding to the mother of the slaves in controversy,) and that he did not intend it to be liable for the debts of James, (meaning James Gillespie, the husband of said Lucy;) that this is all that was said by said Henry Johnson, at the time he delivered said slave to Lucy Gillespie; that said Johnson, some six or eight months after the slave was delivered by him to said Lucy, made the same declaration that he made at the time of the delivery of said slave, and furthermore said, that after the death of said Lucy, the property was to go to her children; that he also said, in the same conversation, that he had loaned said slave to Lucy before,—that when he got it fixed, he intended it to go to her children when she died; that at the time of the first conversation, when the delivery of the slave was made to said Lucy Gillespie, on her return home with said slave, her said husband was informed of the fact that the slave had been given to her, and not to him, and was not to be subject to his control, or liable for his debts; that her said husband then recognized and affirmed the said property to be hers, and not his, and ever afterwards continued so to do,—never exercising any control over said property, but disclaiming all right of control; and asserting that the property, the right of possession, and the right of control, were in said Lucy, and not in himself, and leaving it altogether under her control, and in her possession; she

always asserting, in his presence, that it was her property, and not his, and that she had the right of both property and possession; and he uniformly acquiescing in these assertions of his wife. Further, that the wife, from the time of the delivery of the property to the death of her said husband, uniformly asserted and maintained, without qualification or exception; that both the property and possession were in her, and not in her husband, and he uniformly asserted and maintained the same; that he died in 1849, and left her in the control and possession of the property, under this assertion of title and possession in herself; that plaintiff's intestate often complained, that it was so fixed that he could not control, or exercise any control over it; that he did this very soon after said slave was delivered to Lucy, and ever continued to complain thenceforth during his life; and that plaintiff's intestate was not present when said slave was given to Lucy.

"The plaintiff's attorney moved the court to exclude from the jury all the declarations of James Gillespie, disclaiming the property as his own, and declaring it to be his wife's property; but the court refused to exclude the same, and plaintiff excepted. Plaintiff's counsel also moved to exclude from the jury all the declarations of Henry Johnson, made by him in the second conversation testified to by the witness, as occurring six or eight months after the delivery of the slave to said Lucy; also, to exclude the declarations of Henry Johnson at the time of the delivery of said slave; which motions were severally refused, and to each refusal plaintiff excepted.

"The defendant introduced many witnesses, who testified to the uniform declarations of said James Gillespie, from the time said slave was received by him until his death, that the slaves were not his property, that they belonged to his wife, and that he had no right of possession or control over them; also, to declarations of Lucy Gillespie, in the presence of said James, that the slaves were her property, and not his, and that he uniformly assented to the same. To each of these (declarations) severally plaintiff objected, but the court overruled his objections, and permitted the evidence to go to the jury; and to each of these rulings plaintiff excepted.

"The court, being called on to charge the jury in writing, gave the following charge: 'The law favors the marital rights of the husband, and will not consider them to be interfered with by any disposition of property made for the wife's benefit, unless there is a clear exclusion of his interest and control; but it is well settled, that, in order to create a separate estate in a married woman, no particular phraseology is necessary—it is sufficient, if it manifestly appear that the intent was to secure it to the use of the wife, in such a mode as to be inconsistent with the enjoyment of the gift by the husband, or with the exercise of dominion over it by him.'

"Plaintiff then asked the following charges in writing:

"1. That in order to arrive at the intention of the donor of the slaves, as to the title which the gift conveyed, the jury must confine themselves to his acts and declarations at the time the property was delivered, and cannot look to anything subsequent to this, for the purpose of determining his intention. The court gave this charge, but with the qualification, that no declarations of Henry Johnson could alter the character of the gift, but they might go in explanation of the words and acts in proof at the time of the gift. To the refusal to give the charge as asked, and to the qualification given, plaintiff excepted.

"2. That if the jury believed from the evidence that the donor only intended to exempt the slaves from liability to the husband's debts, that intention would not authorize them to infer that his marital rights were excluded. This charge the court gave, but with the qualification, that the donor might give property to his daughter, a married woman, so as to exclude it from the debts of the husband; to which qualified charge plaintiff excepted.

"3. That the words, 'I intend to give you some property', referring to the slaves in controversy, 'but not subject to your husband's debts', do not create a separate estate in the wife. The court refused this charge, and plaintiff excepted.

"The court charged the jury, on the motion of plaintiff, in writing, that if the gift was to Lucy Gillespie for her life, but not (subject) to James Gillespie's debts, and after her death to her children, then plaintiff must recover; also, that words have the same meaning in a verbal gift, when they are ascer-

tained by the jury, that they have in a will or deed; also, that they cannot believe a separate estate was created by the gift of the slaves, unless they believe that there was a clear and manifest intention by the donor to exclude the marital rights of the husband, and this intention must be shown by the evidence.

"The defendant asked the court to charge the jury, in writing, 'that if they find from the testimony that, when Henry Johnson parted with, and delivered the possession of the slave Hester to said Lucy Gillespie, he intended the slave to be the property of his said daughter, free from all claim of her husband; and that the husband, with the knowledge that such was the intention of said Johnson, when the slave came to his possession, disclaimed all interest in her, and elected to treat her as the property of his wife,—they will find for the defendant.' The court gave this charge, and plaintiff excepted.

"The court also charged the jury, on defendant's motion, in writing, 'that if they find from the evidence that James Gillespie, when the slaves passed into the possession of himself and wife, disclaimed all interest in them as the husband of said Lucy, and elected to treat them as the separate estate of his wife, and, while the slaves were in their possession, repudiated all claim or interest in or to said slaves as the husband of said Lucy, and asserted the property to be in her,—they will find for the defendant.' To this charge plaintiff excepted.

"The court also charged the jury, on motion in writing by the defendant, 'that if the slave Hester was delivered by said Johnson in 1833, to his said daughter, and upon such delivery, and constantly afterwards, she asserted (title) in herself against the marital rights of her said husband, and continued to assert such title during his life, and retained possession under such assertion of title, and her husband acquiesced in her asserted title and possession, and left the slaves in her possession at his death,—then they must find for the defendant'; also, 'that if they find that said slave was given to Lucy Gillespie, as her separate property, she being a married woman at the time of the gift, though the slave

was in the possession of herself and her husband after the gift, the husband could not, by virtue of such possession, acquire any right or interest in said slave, because his possession would not be as husband, but would be referred by the law to the title of his wife'; also, 'that if property is found in the possession of a family, such possession is referred by law to the title of whichever member of that family may have the title.' To each of these charges plaintiff excepted."

The rulings on the evidence, the refusals to give the several charges asked by plaintiff, and the charges given at the request of the defendant, are now assigned as error.

DAVID P. LEWIS, for the appellant:

1. An admission of facts by an attorney of record, for the purpose of trial, binds his client, and is conclusive of the facts admitted.—1 Greenl. Ev. § 186; *Starke & Moore v. Kendall*, 11 Ala. 818; *Doe d. Wetherell v. Bird*, 7 Car. & P. 6. The proper construction of the agreement in this case is, that the defendant is precluded from any defence, except (1st) "that Lucy Gillespie, by the terms of the gift, took an estate in said slave and her increase, to her sole and separate use during her life, to the exclusion of the marital rights of the said James Gillespie"; or (2d) "that said James did not have any title to said slaves whatever."—*Broom's Legal Maxims*, (50 Law Library,) 279. The plaintiff was not prepared, under the agreement, to meet any other issue. The court, therefore, should have rejected the declarations of Johnson, of James Gillespie, and of Lucy Gillespie, as testified to by John Gillespie; they not tending to show either of the matters of defense reserved by the agreement.

2. The admission of the declarations of Johnson in the second conversation, had eight months after the gift, was clear and manifest error.—*High v. Stainback*, 1 Stew. 278.

3. The declarations of Lucy Gillespie, who was the defendant's vendor, were erroneously admitted.

4. The declarations of James Gillespie should have been excluded. The proof shows that he was deceived, or, at all events, mistaken, as to the nature of the gift; and the principle applies, that an estate cannot be defeated, released, or extinguished, by a mistake of opinion, or a confession of law.

Craig v. Baker, Hardin's R. 281-9; 3 Phil. Ev. 378; Ricard v. Williams, 7 Wheaton, 59. Nor is it competent, under the agreement, to show an extinguishment of title by estoppel, release, or in any other mode.

5. At law, where title to property has vested in the husband, as in case of gift or bequest to his wife, no contract which he may afterwards make directly with her, and, *a fortiori*, no declarations or admissions made by him during coverture, can vest the property in the wife, so as to enable her to maintain or resist an action by or against his personal representative.—Machen v. Machen, 15 Ala. 373; Frierson v. Frierson, 22 Ala. 549; Gamble v. Gamble, 11 *ib.* 966; Burnett v. Branch Bank, 22 *ib.* 642.

6. The charge of the court involves the proposition, that a gift to the wife, by the terms of which the husband has not dominion over the property, excludes his marital rights. This would exclude his marital rights whenever a trustee is interposed.—Lenoir v. Rainey, 15 Ala. 667. The charge is erroneous, also, when construed with reference to the agreement of counsel, which the court could not thus ignore.

7. The charges refused to plaintiff, and the charges given against his exceptions, were erroneous, for the reasons above stated, and because contrary to the law as declared in Rugely & Harrison v. Robinson, 19 Ala. 404, and Hill and Wife v. McRae, 27 Ala. 175.

L. P. WALKER, with whom was THOS. M. PETERS, *contra*:

1. A separate estate in a married woman may be created by parol.—Crabb's Adm'r v. Thomas, 25 Ala. 212. The husband's declarations of the wife's property are admissible; and when made while in possession, and in disparagement of his own title, are evidence against his administrator.—Jennings v. Blocker, 25 Ala. 415; Gamble v. Gamble, 11 *ib.* 975. The personal representative, as respects his right to recover, stands in precisely the same relation to the property in which the husband stood; and his declarations, that he regarded the property as his wife's, are binding on his representative. Williams v. Maull, 20 Ala. 729; Jennings v. Blocker, 25 *ib.* 422; Puryear v. Puryear, 16 *ib.* 492; Degraffenreid v. Thomas, 14 *ib.* 684; Marler v. Marler, 6 *ib.* 369; Ricard v.

Williams, 7 Wheaton, 105. There is no rule which permits the personal representative to change his character, and to become the representative of a creditor.—16 Ala. 486. Conceding that the husband, *jure mariti*, was a trustee for his wife, with the legal title in himself; yet, upon his death, the trust was executed, and the legal title was merged in the wife's equity, thereby giving her the absolute property.—Jennings v. Blocker, 25 Ala. 423; Knight v. Bell, 22 *ib.* 199; Puryear v. Puryear, 16 *ib.* 491.

2. Whenever it appears to have been the donor's intention to convey the property to the wife, exclusive of her husband, then, without regarding the particular language used, the husband's rights do not attach.—Williams v. Maull, 20 Ala. 720. The declarations of the donor, at or about the time of the gift, as to the interest which he intended to give his daughter, are admissible, whether the husband was present or not, to show the character of the gift; nor are they to be limited to the precise period of time when the gift was made.—Olds v. Powell, 7 Ala. 657; Hale v. Stone, 14 *ib.* 803. Mrs. Gillespie's declarations of title, made in the presence of her husband, and assented to by him, are his declarations, and clearly admissible.

3. The principle contended for by appellant's counsel, that an estate cannot be defeated, released, or extinguished, by a mistake of opinion, or a confession of the law, only applies where the confessor is in under a written title. In this case, there is no evidence of any written title, or of any mistake of law in the construction of it. The husband's title, if he had any, was evidenced only by possession, and must be limited in its extent to the claim which he asserted.—7 Wheaton, 105.

4. No point can be made on the agreement of counsel. By its terms, the fact which the defendant reserved the right to controvert, was the title of James Gillespie to the property in controversy, and he was not restricted by the agreement in the mode of proof. Whatever facts, therefore, tended to support the defendant's denial of Gillespie's title, were admissible evidence for him under said agreement; with the single qualification, that they were legal evidence.

WALKER, J.—The appellant, as the administrator of the

estate of James Gillespie, deceased, was the plaintiff in a suit involving the title to a negro woman, Hester, and her children. A parol gift of Hester was made, in 1833, and before the birth of the other slaves, by Henry Johnson, to his daughter, Lucy Gillespie, who was, at the time of the gift, the wife of James Gillespie, the appellant's intestate. Lucy Gillespie survived her husband, and after his death, sold the slaves to the appellee. The question in the court below seems to have been, whether the title to the negroes vested in the husband of the donee during her coverture; and the right of the plaintiff depended upon a decision of that question in the affirmative.

The rulings of the court below, permitting the defendant to prove declarations of Henry Johnson, the donor, of Lucy Gillespie, the donee, and of James Gillespie, the appellant's intestate, are presented for revision in this court. An agreement of counsel is found in the bill of exceptions, which, it is argued, precluded the defendant from giving in evidence those declarations. The tendency of the proof objected to was, to negative the existence of any title in James Gillespie to the negroes sued for. Such proof is not only not inconsistent with the agreement, but legitimately belongs to the class of evidence which the counsel, in the agreement itself, reserve the right to introduce. The agreement admits the making of the gift, in 1833, and the coverture of defendant's vendor at the time; but reserves the right to show that the marital rights of the husband were excluded, or that he never had any title. The admission of counsel, that a gift was made during coverture, is not inconsistent with the hypothesis that, by the terms of the gift, or by the conduct and declarations of the husband and wife, the vesting of a title in James Gillespie was prevented. The evidence introduced is not outside of the reservations in the agreement of counsel; and therefore it is unnecessary to inquire, whether the maxim, "*inclusio unius est exclusio alterius*," would apply, and exclude evidence not susceptible of being classed under those reservations. For these reasons, we think that the admissibility of the declarations objected to is not at all affected by the agreement of counsel.

It is set forth in the agreement of counsel, that the gift of Hester was made to Lucy Gillespie in the "*fall of 1833*." The bill of exceptions shows that the defendant was permitted to

prove that, "in 1833", the slave was delivered by Henry Johnson to Lucy Gillespie; and that he declared, the night before, and at the time of the delivery, *that he was going to give her, Lucy Gillespie, some property, (alluding to the mother of the slaves in controversy,) and that he did not intend it to be liable to James Gillespie's debts.*" The defendant was also permitted to prove, that Henry Johnson, "six or eight months afterwards," made the same declarations, and furthermore said, "that after the death of Lucy, the property was to go to her children,—that he had loaned the property to Lucy before, and that when he got it fixed, he intended it to go to her children after her death." It would be clear that the declarations of Henry Johnson, made six or eight months after *the delivery* of the negro to his daughter, were improperly admitted in evidence, if the bill of exceptions had shown that the *gift* was made at the time of the *delivery*; because it would be incompetent for the donor, after the consummation of the gift, by his declarations to affect, or to make evidence in reference to, the title conferred.—See *Olds v. Powell*, 9 Ala. 861; *Rumbly v. Stanton and Wife*, 24 Ala. 712; *Martin v. Hardesty*, 27 Ala. 458. But, while delivery is a necessary constituent of a parol gift; it is not indispensable that it should be simultaneous with the words of conveyance. The bill of exceptions informs us that the delivery was in 1833, but does not specify the time of the year. The delivery may have been, consistently with the bill of exceptions, in the first place, on loan; and may have occurred several months before the gift was actually made in the fall of 1833; and declarations, made six or eight months *after the delivery*, may have been *antecedent to the gift*. Therefore, we are not authorized, from the bill of exceptions before us, to decide that the court admitted in evidence declarations of the donor made after the gift. Indeed, we may intend that the declarations were made before the gift, because the bill of exceptions is as well susceptible of that construction as any other. If the declarations were made before the gift, they would be evidence, in the event they were made by the donor, during the time previous to the gift, when the gift was under consideration and discussion by the donor, and were made in reference to, and in contemplation of it, and were explanatory of the donor's intention.—*Olds v. Powell*, 9 Ala. 861.

The declarations of the donor, made at the time of the delivery, were explanatory of the act done, and admissible as a part of the *res gesta*.

The declarations of the plaintiff's intestate, in opposition to his own, and in favor of his wife's title, were legal evidence against one claiming as the administrator of the declarant's estate, and the court did not err in admitting them.—See *Jennings v. Blocker*, 25 Ala. 415; *Miller v. Jones*, 26 Ala. 247.

It is not very clear from the bill of exceptions, whether all the declarations of Mrs. Gillespie, which the court admitted in evidence, were made in the presence of her husband, the plaintiff's intestate, and acquiesced in by him; but it is certain that such was the case in reference to all of her statements which were objected to, and made matters of exceptions. Declarations, thus made in the presence of, and acquiesced in by the husband, are as competent evidence against his administrator, as they would have been against himself. We deem it proper, however, to remark, that the assertions of the wife, not made in the presence of the husband, nor communicated to him, could only be evidence for her vendee, when they were made while she was in possession of the negroes, and explanatory of her possession.—*Nelson v. Iverson*, 24 Ala. 9; *Johnson v. Boyles*, 26 Ala. 576.

The qualification added by the court to a charge, given at the instance of the plaintiff, is objected to, upon the ground that it authorized the jury to consider the acts and declarations of the donor, subsequent to the gift, in explanation of those which were attendant upon and connected with the making of the gift. The language of the qualification to the charge is such as to leave room for doubt, whether it has the meaning and effect imputed to it. But, as the case must be reversed upon another point, it is not necessary to inquire what is the true construction of the charge given. It is sufficient for us to respond to the question of law presented in the argument of the counsel, and which will probably arise upon the future trial of the cause. We conceive the law upon the question presented to be, that no acts or declarations of Henry Johnson, the donor, subsequent to the completion of the gift, and at a time totally disconnected with the making of the gift, and not in the presence or the hearing of the appel-

lant's intestate, or communicated to him, are evidence in this case, either for the purpose of affecting the gift made, or explaining the words or conduct of the donor at the time of the gift.—*Rumbly v. Stanton, supra.*

The court below, by way of qualification to a charge given upon request of plaintiff, instructed the jury, in effect, that a parent may, by the terms of a parol gift to his married daughter, exclude her husband's marital rights. In doing so, the court did not err, because the instruction given asserted a legal proposition fully recognized by the decision of this court in the case of *Crabb v. Thomas*, 25 Ala. 217.—See, also, *Jennings v. Blocker*, 25 Ala. 415.

The plaintiff below asked in writing a charge as follows: "The words, 'I intend to give you some property, (referring to the slaves in controversy,) but not subject to your husband's debts,' do not create a separate estate." The qualification of a gift to a married woman, by a stipulation that the property shall not be liable to her husband's debts, is not sufficient, standing alone, to exclude the husband's marital rights. The law is so laid down by this court in the case of *Bender v. Reynolds*, 12 Ala. 446. Such a qualification imports an intention to exempt from liability to the husband's debts, and does not of itself imply an exclusion of the husband's title. The charged asked asserts a correct legal proposition, and we are not authorized by the bill of exceptions to regard it as inappropriate to the case. We therefore decide, that in the refusal of that charge the court erred.

As this case must be reversed, we do not deem it necessary to notice with particularity the three other charges given by the court. It will be sufficient for us to lay down one rule of law which seems applicable to the questions presented in those charges, for the direction of the circuit court upon a future trial; and this we are enabled to do without difficulty, as the recent decisions of this court cover the entire ground. If, at the time the slave Hester was given to Mrs. Gillespie, she asserted that the property was received to her separate use, exclusively of her husband, and she uniformly during her husband's life claimed that the possession of the negro, and of the children born after the gift, was under a separate title in her, exclusive of her husband; and the husband

assented to such assertion and claim by her, from the time of the gift to his death,—it must be held, in this suit, between the administrator of the husband and one claiming by purchase from the widow, after the husband's death, that the marital rights of the husband never attached; and it makes no difference whether the husband or wife actually controlled the property. For in such a case it cannot be said that the appellant's intestate has ever, *as husband*, reduced the property to possession. No argument is necessary to sustain this exposition of the law, because, in our judgment, it is fully authorized by the decisions of this court in the cases of *Machem v. Machem*, at the present term, and *Jennings v. Blocker*, 25 Ala. 415.

For the error pointed out in this opinion, the cause must be reversed and remanded.

RAWDON vs. RAWDON.

[BILL IN EQUITY FOR DIVORCE ON GROUND OF INSANITY.]

1. *Insanity or lunacy avoids marriage.*—A valid marriage cannot be contracted by an insane person, nor by a lunatic except during a lucid interval, since he cannot consent to any contract; but mere weakness of mind, unless it amounts to derangement, is not sufficient to avoid the marriage.
2. *Burthen of proving insanity or lunacy.*—The party who alleges insanity or lunacy, in avoidance of a contract, must prove it; but, when the existence of lunacy is once established, it devolves on the opposite party to prove, by testimony equally convincing, that the contract was made during a lucid interval.
3. *Decree of divorce on account of insanity unnecessary yet proper.*—If a marriage is void by reason of the insanity of either one of the contracting parties, no decree of divorce is necessary to restore the parties to their original rights; yet a decree of divorce, in such case, is conducive to good order and decorum, and to the peace and conscience of the party seeking it.
4. *Lapse of time bars relief.*—The lapse of twenty-two years after the discovery of the alleged insanity, before filing bill to avoid marriage on that ground, is a bar to the relief sought.

APPEAL from the Chancery Court of Talladega.

Heard before the Hon. A. J. WALKER.

This bill was filed by Mrs. Elizabeth Rawdon, the appellant, by her next friend, asking a divorce from her husband, Isaac Rawdon, on account of his alleged insanity at the time their marriage was contracted. Its material allegations were, that the parties were married, in 1826, in South Carolina; that said Isaac Rawdon was insane at the time said marriage was celebrated, but this fact was then, and for several years afterwards, unknown to complainant; that his insanity was the effect of a severe attack of brain-fever; that at the time of the marriage, and for some time previous thereto, he apparently enjoyed a lucid interval; that after the marriage complainant noticed many strange things in his conduct, though he was generally an intelligent and sensible man; that about six years after the marriage he suddenly became greatly concerned about the subject of religion, and gave such indubitable proofs of insanity that complainant became satisfied that his mind was permanently deranged; that his attacks have since become more frequent and violent, until his lucid intervals have entirely ceased; that during his paroxysms of insanity he evinced a disposition to shed blood, and complainant was several times compelled to interfere, to prevent him from killing some of the negroes; that he killed their only child, by cutting its throat with a knife, and then erected a scaffold and burned the body,—saying, ‘that he offered his son a sacrifice to God, as Abraham had offered his son Isaac;’ and that he has since been confined in a lunatic asylum at Milledgeville, Georgia.

Publication was made against the defendant as a non-resident, and a guardian *ad litem* was appointed, who filed a formal answer, denying the allegations of the bill, and demanding full proof.

The testimony establishes the main allegations of the bill.

On final hearing, the chancellor dismissed the bill, on the ground that the marriage was shown by the evidence to have been contracted during a lucid interval; and his decree is now assigned as error.

MORGAN & MARTIN, for the appellant.

STONE, J.—The rule is well settled, on both sides of the Atlantic, that no contract is of any validity whatever, if

either of the contracting parties be of *unsound mind*. Such contract is wanting in the essential element—the *concurring assent of two minds*; and hence the law pronounces it absolutely void. This rule is alike applicable to the marriage contract.—Bishop on Marriage and Divorce, § 177; Bright on Husband and Wife, vol. 1, p. 2.

There is some diversity in the opinions of jurists, as to the degree of mental imbecility necessary to avoid the contract; but all agree, that it is *unsoundness*, and not mere *weakness* of mind, unless that weakness be so considerable as to amount to derangement.—Bishop on M. and D. § 178; Wightman v. Wightman, 4 John. Ch. 343. The faculties of a sound mind are links, composing a chain. These links may be worn and weakened, and still the chain exists. Break or destroy one of them, and the unity and continuity are gone.

The doctrine is also well settled, that lunacy of one of the parties will avoid a marriage contract; (Bish. on M. and D. § 187; Crump v. Morgan, 3 Ired. Eq. 91, and cases cited;) but it is equally well settled, that this, like other contracts, if made during a lucid interval, will be upheld.—Bishop on M. and D. § 180; Crump v. Morgan, *supra*. In such cases, there is the *concurring assent* of two minds; and this is the test. To this contract, the general rules of law are applicable; viz., that the party who sets up insanity or lunacy must prove it; and having once established the existence of lunacy, the *onus* is cast on the other party, to prove by testimony equally convincing, that the particular contract was entered into during a lucid interval.—Browning v. Kean, 2 Phill. 69; Bishop on M. and D. § 184.

The authorities are also equally clear, that if a marriage contract be void, by reason of the insanity of one of the parties, the legal sequence is, that no decree of divorce is necessary to restore the parties to their original rights.—*Ex parte Turney*, 1 Ves. & Beames, 140. Yet we cordially approve the sentiment of the distinguished chancellor of New York, that “the fitness and propriety of a judicial decision, pronouncing the nullity of such a marriage, is very apparent, and is equally conducive to good order and decorum, and to the peace and conscience of the party.”—Wightman v. Wightman, *supra*; Crump v. Morgan, *supra*, where most of the authorities are ably collated.

Applying these rules to the case before us: The proof establishes the proposition, that in 1822 or '23, Mr. Rawdon, after his recovery from a fever, was left with his reason dethroned. Improvement and apparent recovery soon supervened; and in 1826, he intermarried with the complainant. For some time before, at the time of the marriage, and for six years afterwards, no fact or circumstance is brought to our knowledge, from which we can infer the slightest mental alienation. Insane impulses, and monomania, again developed themselves,—and the bloody tragedy recorded in the testimony fills the appalling picture. At the time of the marriage, was he incapable of understanding the nature of the contract he was entering into? Was he incapable of taking care of himself and his property? It may be the case, that the testimony of Mr. Rawdon's recovery before the marriage is not fully satisfactory. His subsequent relapse strengthens the inference that the malady was not entirely healed. Do these justify us in visiting on these parties the consequences which must result from declaring the marriage void? In this case, there is no living offspring to suffer by the sentence; but the rule, if we adopt it, may, in some future proceeding, illegitimate a household. We need not now solve this vexed problem.—See *Parker v. Parker*, 2 Leë, (Eng. Eccl. Rep.) 382.

These parties were married in 1826. Six years afterwards, in 1832, Mrs. Rawdon had notice that Mr. Rawdon was insane. She slumbered on her known rights twenty-two years, and filed this bill in 1854. Courts of equity, for the peace of society, discourage antiquated and stale demands; and acting on this inherent doctrine, refuse to interfere where there has been long acquiescence.—*Story's Equity*, §§ 1520, 1520 a, 1521, and notes. Again, courts of equity act on the analogies of the limitations governing actions at law. If this marriage be void, the marital rights of Mr. Rawdon never attached to the property in possession of Mrs. Rawdon. If, in a proper case, suit be brought to recover personalty, the limitation is six years; if realty, ten years. Lapse of time is a bar to relief in this case; and the parties, as to the property, must be left to their remedies at law, if they have any.

The decree of the chancellor is affirmed."

WALKER AND WIFE vs. SMITH.

[BILL IN EQUITY AGAINST HUSBAND AND WIFE TO SUBJECT WIFE'S SEPARATE ESTATE TO PAYMENT OF CHARGE.]

1. *Wife's separate estate may be charged by verbal or implied promise.*—If a married woman, owning a steam saw-mill as part of her separate estate, hires slaves to work in and about it, her separate estate may be subjected in equity to the payment of the hire, although no note was given for it; and if the slaves run away during the term of hiring, and are committed to jail as runaways, and she knowingly permits them to remain in jail until after the expiration of the term, the owner is entitled to reimbursement out of her separate estate, for the amount of jail fees necessarily paid by him, after the expiration of the term, in order to regain the possession of the slaves.
2. *Liability of hirer of slave.*—If a slave runs away during the term of the hiring, and is committed to jail as a runaway, it is the duty of the hirer to pay the necessary jail fees; and if he refuses to do so, the owner, at the expiration of the term, may pay them, and thereby acquire a cause of action against him.
3. *Proper parties to bill to subject wife's separate estate to payment of charge.*—A bill which seeks to subject the separate estate of a married woman to the payment of a charge created by her during coverture, is properly filed against her and her husband; and if it asserts no liability against the husband, and no claim for which either husband or wife can be charged personally, and its frame is such that, if a decree cannot be rendered against the wife's separate estate, no relief whatever can be granted under it, there is no misjoinder of defendants.
4. *Misjoinder of causes of action.*—When the separate estate of a married woman is liable in equity for the hire of a slave under an express contract, and also for reimbursement of jail fees necessarily paid by the owner, after the expiration of the term of hiring, to regain the possession of his slaves, who had been committed to jail as runaways during the term, the two demands may be joined in one bill.
5. *Waiver of objection by failing to raise it in primary court.*—Where the defendants file an answer, embracing a demurrer on several distinct grounds, they cannot afterwards raise in the appellate court, for the first time, an objection to the prayer of the bill, which, if it had been raised before the chancellor, might have been remedied by an amendment.
6. *Service of subpoena on wife.*—Where a subpoena is issued against husband and wife, and is returned by the proper officer "executed" generally, the service on the wife is sufficient.
7. *General motion to suppress deposition.*—A general motion to suppress a deposition, which does not specify any particular grounds of objection, if it can be considered at all in the appellate court, will receive the strongest construction that it reasonably admits of against the objecting party.

APPEAL from the Chancery Court of Macon.

Heard before the Hon. A. J. WALKER.

This bill was filed by James H. Smith against Benjamin W. Walker and Mary E., his wife, alleging that, in December, 1852, said Mary E., then the wife of said Benjamin W. Walker, being possessed of a steam saw-mill as a part of her separate estate which she then owned and enjoyed, and being desirous to hire slaves to work in and about said mill, entered into a contract with complainant for the hire of two slaves, for the year 1853, at a stipulated price, payable on the first day of January, 1854; that in this contract said Mary E. was represented by her said husband, as her agent, and complainant's son acted as his agent; that the slaves were delivered to Mrs. Walker under the contract, were received by her, and were employed for a long time about the business of said mill; that said mill then was, and still is, the separate property of Mrs. Walker, and was managed by her husband as her agent; that she has, in addition, a large separate estate, consisting of lands and personal property; that said slaves, during the year for which they were hired to Mrs. Walker, ran away, and were lodged in jail as runaways; that Mrs. Walker was notified of their confinement in jail, and was requested by complainant to take them out, but she failed and refused so to do; that complainant, after the expiration of the term of hiring, was compelled, in order to regain the possession of his said slaves, to pay jail fees amounting to \$175; that Mrs. Walker is, in equity, bound to refund to complainant the amount thus necessarily paid by him to regain the possession of said slaves, as also the amount of their hire by the terms of said contract; and that she has hitherto refused to do so. The prayer of the bill is, that an account may be stated between complainant and defendants, of and concerning the matters embraced in the bill, and that defendants may be decreed to pay to complainant whatever sum they may be found in arrears to him; and the prayer for other and further relief is added.

An answer on oath being waived, the defendants filed a joint and several answer, in which they admitted that Mrs. Walker owned a separate estate, of which the said steam saw-mill constituted a part, but denied that she made the contract alleged in the bill, or any other contract for the hire of slaves from complainant, or that her husband acted as

her agent in making any such contract; and alleged, on the contrary, that said Benjamin W. Walker hired said slaves from complainant for himself, and received possession of them under the contract. They allege fraud and misrepresentations, on the part of complainant, in the making of this contract, and a consequent rescission by said Walker. Their answer also contains a demurrer, 1st, for want of equity; 2d, because complainant has a remedy at law; 3d, on account of a misjoinder of defendants; 4th, on account of a misjoinder of accounts; and, 5th, because complainant cannot be permitted, by paying the jail fees to the sheriff, to make Mrs. Walker his debtor, without her request.

The questions raised on the evidence need not be noticed.

On final hearing, the chancellor overruled the demurrer, and rendered a decree in favor of the complainant, subjecting Mrs. Walker's separate estate to the payment of his demands; and this decree, with the refusal to suppress certain depositions, is now assigned as error.

GEOR. W. GUNN, for the appellants, made these points:

1. The evidence of service was not sufficient to bring Mrs. Walker into court.—Hollinger and Wife v. Bank of Mobile, 8 Ala. 605; Hartley v. Bloodgood, 16 *ib.* 233; Ferguson v. Smith, 2 Johns. Ch. 139; 1 Dan. Ch. Practice, 500, note 2; 1 Hoff. Ch. Pr. 232.

2. The bill is radically defective, and the demurrer to it should have been sustained. The demand which it seeks to enforce is shown to be a general demand, resting only in parol; and for such demands the wife's separate estate is not liable.—Clancy on Husband and Wife, 344-46, and cases cited; Dan. Ch. Pr. 199; Bradford and Wife v. Greenway, Henry & Smith, 17 Ala. 802. The *dictum* to the contrary in Collins v. Rudolph, 19 Ala. 616, is unsupported by authority.

3. A married woman is incapable of charging herself personally, either at law or in equity. Charges on her separate estate are regarded in equity as appointments, or appropriations, for the benefit of the creditor, of so much of her estate as may be necessary for its payment; but the power to create these charges is derived, not from the law, but from the deed of settlement. A bill, therefore, which seeks to subject her

estate to the payment of such charge, must show that she holds that estate under a deed which allows her to charge it, and must contain a prayer for the specific relief sought. In both these particulars, this bill is fatally defective: it contains no specific prayer for relief against the wife's separate estate, but asks only a personal decree against the defendants; nor does it show that she has the power to charge her separate estate.—Dan. Ch. Pr. 194, 198, and cases cited; *Strange v. Watson*, 11 Ala. 324; 2 *Story's Equity*, §§ 1399 to 1401; 2 *Kent's Com.* 164, 166; *Jacques v. M. E. Church*, 17 Johns. 548; *Gardiner v. Gardiner*, 22 Wend. 528; *Ewing v. Smith*, 3 Dess. 417; *N. A. Coal Co. v. Dyett*, 7 Paige, 27; *Magwood & Patterson v. Johnston*, 1 Hill's (S. C.) Ch. 228; *Cumming & Pollock v. Williamson*, 1 Sandf. Ch. 17; *Curtis v. Engel*, 2 *ib.* 287; *Rogers v. Ludlow*, 3 *ib.* 104; *Lyne's Executor v. Crouse*, 1 Barr, 111; *Williamson v. Beckham*, 8 Leigh, 20; *Montgomery v. Agricultural Bank*, 10 Sm. & Mar. 567; *Doty v. Mitchell*, 9 *ib.* 435; *Morgan v. Elam*, 4 Yerg. 375; *Marshall v. Stephens*, 8 Humph. 159; 9 *Watts*, 137; 1 Bro. C. C. 16; 2 *Roper on Husband and Wife*, 241, note; *Francis v. Wigzell*, 1 Madd. 145.

4. The demurrer for multifariousness should have been sustained. The negro hire and jail fees are separate and distinct items, having no necessary connection. As asserted in the bill, the first is a joint demand, and the other a separate demand.—*Story's Equity Plead.* 280; Dan. Ch. Pr. 393; 6 Johns. Ch. 163; *McIntosh v. Alexander*, 16 Ala. 87.

5. The payment of the jail fees by complainant did not constitute defendants his debtors.—*Kenan v. Holloway*, 16 Ala. 53; *Wray v. Cox*, 24 *ib.* 337.

6. The case is with the appellants on the merits.

WILLIS & WILLIAMS, and CLOPTON & LIGON, *contra*:

1. The bill sets forth a good equitable cause of action, and the husband and wife are properly joined as defendants. The demands sought be enforced are proper charges against Mrs. Walker's separate estate.—*Collins v. Rudolph*, 19 Ala. 616; *Hooper v. Smith and Wife*, 23 *ib.* 639; *N. A. Coal Co. v. Dyett*, 7 Paige, 9; same case, 20 Wend. 570. If the deed under which she held her separate estate restricted her power

to charge it, that was matter of defense, and should have been shown in her answer.

2. It was Mrs. Walker's duty, at the expiration of the term of hiring, to return the slaves to their owner. This she failed to do, but suffered them to remain in jail; and complainant was compelled, in order to regain possession of them, to pay the necessary jail fees. For this payment he is entitled to reimbursement out of her separate estate. The claim for the hire of the slaves, and the claim for reimbursement on account of the jail fees, grow out of the same contract, and may be enforced in the same suit.

3. The prayer of the bill, though not formal, is sufficiently specific; and, even if the special prayer were defective, the appropriate relief would be granted under the general prayer.

4. The return of the sheriff shows, in legal effect, a service on both the defendants.

RICE, C. J.—When a married woman, owning a steam saw-mill as part of her separate estate, hires slaves of another to work in and about it, at a specified price and for a specified term, and receives them into her service, her separate estate may be subjected by a court of equity to the payment of such price, although no note was given for it; and the bill for that purpose may be filed against her and her husband.—*Ozley v. Ikleheimer*, 26 Ala. 332; *Calvert on Parties*, 269; *Dyett v. N. A. Coal Co.*, 20 Wend. 570; *Waldron, Isley & Co. v. Simmons*, at the present term.

If, during the term of hire, the slaves run away from her, and are taken up and committed to jail as runaways in this State; and, with notice of this, she permits them to remain in jail until the expiration of the term; and the owner, to regain possession of them, is compelled to pay their jail fees, —he thereby acquires a right to reimbursement of the sum thus paid, out of her separate estate. It was her duty to pay these fees, and to restore the slaves to their owner at the expiration of the term of hire.—*Story on Bail*. § 397. As she disregarded her obligation in this respect, the owner, at the expiration of the term, had the right to pay such fees, in order to regain the possession of his slaves, and to obtain reimbursement out of her separate estate. The jailer had a

right to detain the slaves until the fees were paid. The owner has been compelled to pay a debt, which, in equity and good conscience, she should have paid, and therefore his right to reimbursement rests upon sound principle.—*Plummer v. Sherman*, 29 Maine Rep. 555; *Ticonic Bank v. Smiley*, 27 *ib.* 225; *Mix v. Hotchkiss*, 14 Conn. 32.

The bill in this case asserts no liability against the husband. It shows nothing for which either the husband or wife can be charged personally. It sets forth a demand for which her separate estate is liable, if the allegations of the bill are established. The frame of the bill is such, that if a decree cannot be rendered against her separate estate, no relief whatever can be granted under it. It is clearly a bill to subject her separate estate to the payment of the demand therein set forth. There is no "misjoinder of defendants," nor of "accounts."—*Calvert on Parties*, 269-273; *Gerald and Wife v. McKenzie*, 27 Ala. 166.

As the defendants filed a joint and several answer, embracing a demurrer specifying five distinct grounds, and did not by demurrer or otherwise, in the court below, raise the objection, that the bill contains no special prayer for a decree against the separate estate of the wife, and that under the general prayer no such decree can be made, we will not even consider that objection. By failing to raise such an objection in the court below, where, if it be a sound one, it might and ought to have been remedied by an amendment, the party loses the benefit of it in the appellate court.—*Code*, § 2900.

The subpoena issued in this case embraced both husband and wife, and was returned by the sheriff, "executed." This return means that he served both husband and wife, and shows that she was made a defendant in compliance with our 4th rule of practice in chancery.—*Hollinger v. Bank*, 8 Ala. 605.

The evidence convinces us that the substantial allegations of the bill are true, and that the slaves of the complainant were not hired upon the mere credit and personal liability of the husband.—*Dyett v. N. A. Coal Co.*, *supra*.

Two depositions of Thomas B. Jones, and two depositions of Bythou Smith, appear in the record. The deposition of

Jones last taken, and the deposition of Smith last taken, were taken by the defendants, and certainly contain nothing which would authorize either of the defendants to ask for their suppression; yet the record shows that Mrs. Walker moved "to suppress the depositions of Thomas B. Jones and Bythou Smith as evidence against her", and that the motion was overruled. This motion to suppress is general. It specifies no ground on which the suppression was asked. It does not even show that it sought to suppress only one of the depositions of Jones, and only one of the depositions of Smith. Its language is broad enough to admit of the construction that it sought to suppress both depositions of Jones, and both depositions of Smith. Thus construed, it is clearly not sustainable; and if such general motions can be considered at all on an appeal, the strongest construction which they reasonably admit of, against the party making them, will be placed upon them.

There is no error in the decree, and it is affirmed, at the costs of the appellants.

BEESON vs. WILEY, BANKS & CO.

[TRIAL OF RIGHT OF PROPERTY IN SLAVE.]

1. *Insolvency of defendant in execution, when admissible evidence, and how proved.*—On a trial of the right of property in a slave, where the claimant derives title under a conveyance from the defendant in execution, which is attacked on the ground of fraud, the plaintiff may show that, at the time of the execution of the conveyance, the defendant in execution was insolvent; and evidence of notes outstanding against him at that time, and of a judgment rendered on one of such notes, is admissible as tending to prove the fact of insolvency.
2. *Error without injury in rendering judgment for costs against surety on claim bond.*—The rendition of a joint judgment for costs against the claimant and his surety on the claim bond, even if erroneous, is not prejudicial to the claimant, and for that reason is not available on error.

APPEAL from the Circuit Court of Blount.

Tried before the Hon. EDMUND W. PETTUS.

This was a trial of the right of property in a slave, between the appellees, plaintiffs in execution against Vestal Beeson and another, and Clayton G. Beeson, the appellant, who was the brother of said Vestal, as claimant. On the trial, as appears from the bill of exceptions, the claimant offered evidence tending to show that, several months before the plaintiffs' execution was levied, he purchased said slave from said Vestal Beeson; and paid full value for him; and that the plaintiffs then introduced evidence to impeach said sale on the ground of fraud. "For the purpose of showing that said Vestal Beeson was insolvent at the time of said sale to claimant, the plaintiffs offered in evidence the original papers, judgment entry, and notes, (on which the suit was instituted,) in the case of said Wiley, Banks & Co. against said Lewis & Beeson, after proving by the clerk that said case had never been recorded; also, the execution of said notes, and that said Vestal Beeson was a member of said firm of Lewis & Beeson; also, the execution of a promissory note by said Lewis & Beeson, whilst partners, to Courtney & Tennent, and offered said note in evidence. To the introduction of said original papers, judgment entry and notes, and also of said note to Courtney & Tennent, the claimant objected; but the court overruled his objection, and he excepted."

The admission of this evidence, and the rendition of a joint judgment for costs against the claimant and his surety on the claim bond, are now assigned as error.

D. C. HUMPHREYS, and ROBINSON & JONES, for appellant.
LOUIS WYETH and J. W. SHEPHERD, *contra*.

WALKER, J.—On a trial of the right of property, in which is involved the question of fraud in a conveyance by the defendant in execution to the claimant, the plaintiffs may show that the defendant, at the time of the conveyance, was insolvent. Proof of notes outstanding at the time of the conveyance, and of a judgment rendered on one of such notes, would be admissible evidence, as tending to prove the insolvency.

The claimant, in a trial of the right of property, is not injured by the fact that a joint judgment for costs is rendered

against himself and his surety on the bond. If such judgment for costs be erroneous, it is not prejudicial to the claimant, and he cannot be heard to complain of it.

The judgment of the court below is affirmed.

HARRIS vs. THE INTENDANT AND COUNCIL OF LIVINGSTON.

[SUMMARY PROCEEDING FOR VIOLATION OF MUNICIPAL ORDINANCE.]

1. *By-law of municipal corporation, in reference to sale of spirituous liquors, held void.*—The charter of an incorporated town gave power to its municipal authorities "to ordain all such ordinances and resolutions, and to make all such regulations, as may by them be deemed necessary for the control of the retailing of spirituous liquors within said town; to grant license for retailing of spirituous liquors within said town, upon such sum, to be paid therefor by each retailer, not to exceed \$2,000 *per annum*, as said intendant and council may order; to restrain and prohibit them, when deemed a nuisance; and, in general, to adopt such a system of police and municipal regulation, in regard to the traffic in ardent spirits, as shall be deemed by them most conducive to public order, morality and policy, in reference to the black or colored population:" *Held*, that the term "retailing," construed with reference to the general policy of the law in relation to the sale of ardent spirits, meant selling in small quantities; and that, though the charter authorized the entire prohibition of *retailing*, yet an ordinance which prohibited, under a penalty, the sale of spirituous liquors in *less quantities than twenty gallons*, without a license, was unauthorized and void.

APPEAL from the Circuit Court of Sumter.

Tried before the Hon. THOMAS A. WALKER.

The appellant was fined by the municipal authorities of the town of Livingston, for a violation of a town ordinance, and took an appeal to the circuit court. On the trial in that court, as appears by the bill of exceptions, the plaintiffs read in evidence an act of the legislature, approved February 9, 1852, entitled "An act to extend the power and authority of the intendant and council of the town of Livingston," which may be found in the session acts of 1851-2, on page 336, and which is as follows :

"Be it enacted," &c.; "that the intendant and council of the town of Livingston, in the county of Sumter, shall have full powers to ordain all such ordinances and resolutions, and to make all such regulations, as may by them be deemed necessary for the control of the retailing of spirituous liquors within said town; to grant license for retailing of spirituous liquors within said town, upon such sum, to be paid therefor by each retailer, not to exceed \$2,000 *per annum*, as the said intendant and council may order; to restrain and prohibit them, when deemed a nuisance; to provide regulations for the punishment of any negro, or white person, who shall buy any species of ardent spirits, and furnish a slave; and, in general, to adopt such a system of police and municipal regulation, in regard to the traffic in ardent spirits, as shall be deemed by them most conducive to public order, morality and policy, in reference to the black or colored population, not forbidden by the constitution and laws of this State."

The plaintiffs then read in evidence an ordinance, passed by said intendant and council on the 7th June, 1855, which was in these words: "Be it ordained," &c., "that it shall be unlawful for any person, or persons, to sell or retail any spirituous or vinous liquors, within the corporate limits of the town of Livingston, in a less quantity than twenty gallons, unless they shall first have obtained a license from the intendant and council of said town for the same; and any person violating this ordinance shall forfeit and pay a fine of ten dollars, for each and every offence, upon conviction before any member of the council; and that this ordinance shall take effect from and after the 18th day of June inst., and that it shall not apply to any licensed druggist, when sold for medical purposes."

The plaintiffs then proved, that the defendant, after said ordinance went into effect, sold in said town of Livingston one gallon of whiskey, without having first procured a license from the municipal authorities, and that for so doing he was fined ten dollars. "This was all the evidence in the cause; and thereupon the court charged the jury, that if they believed it, they must find a verdict for the plaintiffs, for said sum of ten dollars." The defendant excepted to this charge, and he now assigns it as error.

TURNER REAVIS and S. A. HALE, for appellant.

A. A. COLEMAN, *contra*.

STONE, J.—The act of 1835, “to incorporate the town of Marion,” employs almost the same language as that found in the act “to extend the power and authority of the intendant and council of the town of Livingston.”—Sess. Acts 1851–2, p. 336. The former statute received a judicial construction in this court, in the case of *The Intendant and Council of the Town of Marion v. Chandler*, 6 Ala. 899. It was there held, that the ordinance of the intendant and council was intended to operate a prohibition of retailing; and that, as such, it was within the pale of the powers conferred by the act of incorporation. The record does not inform us what sum the Livingston ordinance prescribed as the cost of a license to retail; but we have seen that, under the above authority, it might be made prohibitory.

In this case, the ordinance prohibits a sale in less quantities than twenty gallons; and the question is presented, does the act of incorporation confer that power? All the grants in this connection, except one after noticed, relate in terms to retailing. Is every sale, in quantity less than twenty gallons, necessarily a sale by retail? Lexicographers place the word ‘retail’ as the opposite of wholesale; and if we should consult them alone, we would be left in much uncertainty on this point. Our own long continued legislation on this subject, furnishes the best exposition of the intention of the legislature. Thus defined, the business of retailing, and the keeping of a tippling house, are substantially one and the same occupation. To sell at retail, is to sell in small quantities. The general prohibition against unlicensed venders is, that they shall not sell in quantities less than one quart. There are also qualified limitations on the right to sell in quantities of a quart and upwards. We hold, that the legislature, in the act of incorporation, when they employed the terms ‘retailer’ and ‘retailing,’ must be presumed to have had reference to our general policy in relation to the sale of ardent spirits. The ordinance in question goes beyond that boundary, and is unauthorized and inoperative.

The general grant to the corporate authorities, “to adopt

such a system of police and municipal regulation, in regard to the traffic in ardent spirits," &c., is confined in express terms to public order, morality and policy, *in reference to the black or colored population*. This is persuasive to show that a larger discretion is conferred over the traffic with slaves, than over the general commerce in ardent spirits.

The jurisdiction of incorporated cities and towns, is not limited to the express grants of authority. They have many incidental powers.—Mayor, &c., of Mobile, v. Yuille, 3 Ala. 137; 6 Ala. 899. But these incidental powers must be german to the purpose for which the corporation was created. They will not be enlarged by construction, to the detriment of individual or public rights.—Stormfeltz v. The Manor Turnpike Company, 13 Penn. 555; March v. Commonwealth, 12 B. Monroe, 29.

The judgment of the circuit court is reversed, and the cause remanded.

HUNT, FROWNER, ET AL. vs. ACRE, JOHNSON, ET AL.

[BILL IN EQUITY, BY HEIRS OF MORTGAGOR, TO SET ASIDE DECREE OF FORECLOSURE, COMPEL ACCOUNT OF RENTS AND PROFITS, AND REDEEM MORTGAGED PREMISES.]

1. *Decree of foreclosure, conclusiveness and effect of.*—The effect of a decree of foreclosure under a mortgage is not so extensive as that of a decree in a proceeding *in rem*: it does not prejudice the rights of those who ought to be, but are not parties. If the mortgagor dies before the rendition of the decree, and the suit is thereupon revived against his administrator and sole devisee, and not against his heirs, the decree of foreclosure, and the complainant's purchase of the premises at the master's sale, are both void, as against the heirs of the mortgagor, if they set aside the probate of their ancestor's will, by bill in chancery, within the time allowed by the statute.
2. *Decree in chancery annulling probate of will, conclusiveness and effect of.*—A bill in chancery to set aside and annul the probate of a will is in the nature of a proceeding *in rem*, to which any person having an interest may make himself a party; and the decree, annulling the probate, is final and conclusive, as to the validity of the will, in all courts and upon all persons, until set aside or reversed in some direct proceeding.

Hunt, Frowner, et al. v. Acre, Johnson, et al.

3. *Proper parties to bill of revivor in foreclosure suit.*—In a suit for the foreclosure of a mortgage, if the mortgagor dies before the rendition of the final decree, and his will is admitted to probate by the court having jurisdiction, his heirs-at-law, as well as his personal representatives and devisees, are proper parties to the bill of revivor, and the complainant proceeds without them at his peril, since they have the statutory right to impeach the probate of the will, by bill in chancery, at any time within five years.
4. *Discounting note at illegal rate of interest is usury, and available as defence against assignee.*—Discounting a note on a third person, eleven months before its maturity, at four per cent. per month, and taking the endorsement of the holder, with a mortgage on his property to secure its payment, do not constitute a *bona fide* purchase of the note, but a usurious loan; and if the note and mortgage are then assigned to another person, at the same usurious rate of discount, and with notice of the usurious nature of the transaction, the mortgage is open in his hands to the defence of usury.
5. *Usury a defence to suit for foreclosure of mortgage.*—Usury in the transaction in which the mortgage had its origin, may be set up as a defence, *pro tanto*, to a bill for foreclosure; and its effect, if established, is to discharge the party from the payment of any interest whatever on the debt.
6. *When legal interest must be paid on usurious loan.*—If a debtor comes into equity, for relief against a judgment at law, or other legal security, on the ground of usury, where he has by his own voluntary act deprived himself of the opportunity to appear and plead the usury in the character of defendant, he is required to pay principal and legal interest; but this rule does not apply, in the absence of such voluntary act, where the heirs of the mortgagor come into equity to redeem the mortgaged premises, to set aside a decree of foreclosure, which was obtained by the creditor in a suit so conducted as to deprive them of the opportunity to appear and plead the usury, and to remove the cloud on their title created by the proceedings in the foreclosure suit.—(WALKER, J., dissenting.)
7. *Jurisdiction of equity to remove cloud on title.*—If the mortgagee obtains a decree of foreclosure against the personal representatives and devisees of the mortgagor, without making the heirs-at-law parties to the suit, and becomes the purchaser of the premises at the master's sale, this constitutes such a cloud on the title of the heirs, after they have set aside the probate of the will by bill in chancery, as authorizes them to ask the interposition of equity for its removal.
8. *Deed of widow, before assignment of dower, passes what interest.*—If the widow of the mortgagor, while in possession of the mortgaged premises, before dower is assigned to her, conveys by deed to the mortgagee, if her deed is effective for any purpose as against the heirs, her alienee certainly does not thereby acquire more than the right to retain one third of the rents and profits of the premises.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. J. W. LESESNE.

This bill was filed by the appellees, as heirs-at-law of Samuel Acre, deceased, to redeem a certain lot in the city of Mobile, under a mortgage executed by said Acre in his lifetime; to set

aside a decree of foreclosure, obtained under the mortgage by Jonathan Hunt, one of the defendants, who was an assignee of the mortgage; and to compel an account of the rents and profits of the mortgaged premises. The widow of said Acre, with her present husband, James Frowner, who were the defendants in Hunt's foreclosure suit, and an infant heir-at-law of said Acre, are made co-defendants with Hunt. The material allegations of the bill are as follows:

That Acre was seized and possessed in his lifetime of the premises now in controversy, and was also the owner and holder of a certain promissory note for \$5,026 61, executed by one John Milton, dated March 2, 1836, and payable two years after its date; that in April, 1837, eleven months before said note became due, Acre transferred said note to Charles Smith, who was the agent of said Hunt in the transaction, and executed to him a mortgage on said premises to secure its payment; that Acre only received from Smith \$2,814 91, the note being discounted at the rate of four per cent. per month; that this amount was paid by Smith to Acre out of the funds of Hunt, for whom Smith was acting as agent; that a formal transfer, or assignment, of the note and mortgage, was made by Smith to Hunt a few days afterwards, but there was no consideration for it, and the whole transaction was a mere contrivance to shield Hunt from the charge of usury; that on the 9th October, 1838, said Hunt, claiming to be assignee of Smith, filed his bill in the chancery court at Mobile, against said Acre, who was then in a lunatic asylum under an inquisition of lunacy, for a foreclosure of said mortgage; that no answer or defence was put in by the guardian of said Acre; that said Acre died about the 12th November, 1838, intestate; that soon after his death, his widow produced before the orphans' court of Mobile a paper, purporting to be his last will and testament, in which she was made sole devisee of the mortgaged premises; that said paper was admitted to probate by said court, as the last will and testament of said Acre, without notice or citation to the heirs-at-law, and letters of administration were granted to the widow, in connection with the sheriff of the county; that Hunt afterwards made said administrators, together with James Frowner, with whom the widow had intermarried,

parties to his foreclosure suit by bill of revivor, and at the May term, 1840, they answered the bill, setting up a good defense to it; that no further proceedings were had in the cause until the April term, 1843, when said Frowner and wife abandoned their defense, and consented that a decree should go in Hunt's favor for the full amount of his claim.

The bill further alleges, that the complainants, as heirs-at-law of said Acre, who had not been made parties to Hunt's foreclosure suit, filed their bill in said chancery court, in December, 1841, against said Frowner and wife, to set aside the probate of said Acre's will, on the ground of his insanity at the time it purported to have been executed; that at the April term, 1843, on the same day the decree was entered by consent in Hunt's foreclosure suit, an issue at law was ordered by the chancellor to test the validity of said will, and at the April term, 1844, on the verdict of the jury, a decree was rendered, setting aside the probate of said pretended will, and declaring it null and void; that Hunt's solicitors in the foreclosure suit were also the solicitors of said Frowner and wife, in the suit to set aside the probate of the will, and as such had notice of all the proceedings; that at the April term, 1843, Frowner and wife, in consideration of \$1,000, paid to them by Hunt, besides letting a decree go against them by consent, executed a deed to said Hunt for the mortgaged premises; that this consideration was paid by Hunt for Mrs. Frowner's dower-right in the mortgaged premises, which was known by the parties to be the only right or title she had, and the transaction was intended to enable Hunt to get the immediate possession of the premises, so that he might claim title to the same as a *bona fide* purchaser from the pretended devisee; that Hunt went into possession of the premises under his deed from Frowner and wife, and also became the purchaser at the master's sale under the decree in his foreclosure suit; that the master's report of the sale was confirmed at the April term, 1844, and the master was ordered to make a deed to Hunt, which he did; that Hunt received from Milton, the maker of the note, the full amount justly due him, and ought to be charged with the rents and profits of the land from the time he went into possession.

The prayer of the bill is, that the decree of foreclosure

Hunt, Frowner, et al. v. Acre, Johnson, et al.

obtained by Hunt, his purchase at the master's sale, and his deed from Frowner and wife, may be set aside and declared null and void; that an account may be taken of the rents and profits of the mortgaged premises since they went into the possession of the defendants; that complainants may be put in possession of the premises; and for general relief.

A decree *pro confesso* was entered against Frowner and wife for want of an answer. A guardian *ad litem* was appointed for the infant defendant, who filed the usual formal answer. A guardian *ad litem* was also appointed for Hunt, who filed an answer, insisting on the regularity and validity of the proceedings in the foreclosure suit; denying that Hunt had notice, actual or constructive, of the proceedings in chancery to set aside Acre's will; alleging that said proceedings were colorable and collusive, were not defended by Frowner and wife, and ought not to have any effect on Hunt's rights; and requiring strict proof of all the allegations of the bill.

On final hearing, on pleadings and proof, the chancellor rendered a decree in favor of the complainants, and ordered a reference to the master of the matters of account; and his decree is now assigned as error.

P. HAMILTON and R. H. SMITH, for appellants:

1. A party who seeks equity, must do equity: these plaintiffs, seeking to obtain a benefit from the charge of usury, should re-pay the money actually received by their ancestor, with legal interest from the time of its receipt. The court allowed Hunt's estate a credit for the money he had paid for the note, with interest from the maturity of the note; while, if the charge of usury be established, Hunt should be allowed interest from the time the money was paid by him, and not simply from the maturity of the note.—*Livingston v. Harris*, 3 Paige, 534; *Fanning v. Dunham*, 5 Johns. Ch. 142.

2. The court erred in treating Hunt's purchase of the note, for which the mortgage was executed, as subject to the charge of usury. Hunt acquired the note and mortgage from Smith. There is no evidence of the consideration on which the note was made by Milton and passed to Acre, and it must therefore be taken as valid in its inception; and if so, it was a legitimate subject of sale to Smith, and by him to Hunt.—14 Ala.

568. The sale to Smith, even if usurious, worked no taint in the hands of a subsequent holder, for an intermediate usurious endorsement did not invalidate the paper, or the debt which it represented. The fraud must attach to the note, at the time of its creation, as a security for a loan.—*Dowe v. Schutte*, 2 Denio, 621; *Cameron v. Chappell*, 24 Wendell, 94; *Gaither v. Bank of Georgetown*, 1 Peters, 43. Hunt claims as assignee of Smith; and though, possibly, if the suit were against Smith, Hunt could only recover what he gave for the note, yet, as against the maker and a prior endorser, he can recover the amount due on the note.—*Judd v. Seaver*, 8 Paige, 548. As to the mortgage, also, Hunt is the assignee of Smith, and can recover the mortgage debt without reference to what he gave for it.—*Coote on Mortgages*, 303.

Hunt acquired the debt by purchase from Charles Smith; and even if the dealing between Smith and Acre was usurious, Hunt was no party to it. The evidence shows that Smith, at the time of the purchase, was not the agent of Hunt, but had ceased acting as such agent several months before he acquired the note from Acre. He ceased to be Hunt's agent, when Sidney Smith became his agent; and the latter testifies that, at the time of Hunt's acquisition of the note, his business was transacted partly by himself, and partly through the agency of Norris, Stodder & Co. The proof fails to sustain the charge of the bill, that Charles Smith was acting as the agent of Hunt, and that this arrangement was a mere pretense. Charles Smith swears, that he purchased for himself. Magee swears, that he did not know Hunt in the transaction; that he received the money from Huntington & Smith, though he knew that it was for account of Charles Smith; and that Hunt, when the note was offered to him, declined to buy it. Smith's ability to make the purchase is proved by Magee and others; and though he failed in business prior to 1830, when he came to Mobile, all the debts of his house were arranged within three or four years afterwards. At the time of his negotiation with Magee for this note, Smith and Huntington were partners, and were engaged in a large business in Mobile. Smith, then, acquired this note with his own funds, though with the knowledge that he could sell it to Hunt. He swears that Hunt purchased it from

him, and did not receive it in payment of any debt due from him to Hunt. Smith obtained it at a discount of four per cent. per month; but there is no proof of what Hunt gave him for it, except that he obtained it "at a large discount." The charge of usury is made against Hunt, but is not sustained by the proof. Fraud and usury are never to be presumed. The evidence is certainly too vague to brand Hunt's connection with this matter as usurious. The decision of the chancellor, on this part of the case, ought not to be sustained.

3. The chancellor erred, in his final decree, in not allowing any effect to the deed of Frowner and wife to Hunt; thus failing to carry out the principle asserted in directing the account before the master, namely, to allow Hunt one third of the income of the land, as the holder of the widow's dower-right. It was held, in 19 Ala. 372, that the alienee of the widow cannot defend an ejectment by the heirs, and that her title is not the subject of alienation; but this decision seems to be a departure from the cases of *Murphy v. Inge*, and *Shelton v. Carroll*, (14 Ala. 289; 16 *ib.* 146,) as also from the spirit of the statute, which gives the widow the right of quarantine as a means of support, and to compel the heir to assign her dower. If the right of occupation is not purely personal, and she may occupy by her tenant, (14 Ala. 289,) it is not easy to see why her alienee, who can only be her tenant in fact, occupying for an aggregate instead of an annual value, could not also defend on her title. This case, however, is not at law, but in equity. There, it was a question of title; here, of equitable rights. The complainants, seeking equity, must do equity. The widow had a right to the possession of the whole until her dower was assigned; and her right was a perfect and favored right, which she was not required actively to enforce. It was the duty of the heirs, to assign her dower by metes and bounds, if possible; and if that had been done, she could assign. Dower not being assigned, her support may have demanded a transfer of her right of possession. If she was in possession, she could not be held to account for rents and profits; nor should her assignee be held accountable. If not good to shield the mortgagee from an account to the extent of the full value of

the rents and profits, it should be good, at least, to the extent of her third part of the income. But, if the rule in 19 Ala. 372 be extended to this case, still the chancellor erred, in not giving the defendants the benefit of the consideration paid by Hunt to Mrs. Frowner; because his purchase enured to the benefit of the heirs, in extinguishing the dower-right of the widow, which was an encumbrance on the land against the heirs.—11 Price, 58.

4. The chancellor erred, also, in reference to the effect of the decree in favor of the heirs of Acre, setting aside the probate of his will. Hunt's bill to foreclose the mortgage was filed on the 9th October, 1838, in the lifetime of Acre; and the bill of revivor against his administrators and devisee was filed more than a year before the proceedings to impeach the validity of his will were commenced. Hunt was not made a party to the proceedings to set aside the will, which were conducted between the heirs and devisee of Acre; and he obtained his decree of foreclosure a year before they obtained their decree. His bill was pending when they filed theirs; yet they did not make him a party to their suit. Acre's will, by which the land now in controversy was devised to his wife in fee, was admitted to probate, by the orphans' court of Mobile, on the 14th November, 1838; so that the only parties whom Hunt could properly bring before the court by his bill of revivor, were the administrators and devisee. These parties he did bring before the court, and they were the proper parties to be before the court during all the time his bill was pending. The interest of the heirs was not established until a year after he had obtained his decree; and up to that time, *non constat* that they had any interest in the property. They had no interest under the will, which had been judicially established by the tribunal to which the entire subject was by law confided.

The state of things at the commencement of the suit determines the jurisdiction, and no subsequent change of interest in the parties affects that jurisdiction.—Conolly v. Taylor, 2 Peters, 565; Campbell & Emerson v. Emerson & Moore, 2 McLean, 30; Koppel v. Heinrichs, 1 Barb. (S. C.) R. 449; Dunn v. Clarke, 8 Peters, 1; 9 Wheaton, 539-40; 15 Howard, 198. Parties who subsequently become inter-

ested, take their interest subject to the jurisdiction previously acquired by the court. The interest of these heirs, therefore, as declared by the decree in April, 1844, setting aside the probate of Acre's will, stood affected by the jurisdiction acquired by the court under Hunt's bill in 1838. At the time their bill was filed, in 1841, they proceeded chargeable with notice of Hunt's suit. The doctrine of *lis pendens* applies to them, and not to Hunt, who proceeded with the proper parties when no litigation was pending, and when the title of the devisee, which had been judicially declared, was in no way impeached.—*Hopkins v. McLaren*, 4 Cowen, 667. The doctrine is not applicable to Hunt, because he acquired his interest before any suit was begun, and had himself become an actor to enforce his rights, before the death of Acre, and before the right of either heirs or devisee had sprung into existence; and that his equity ripened into a legal title subsequent to the filing of their bill, does not alter the question.—*Trimble's Lessee v. Boothby*, 14 Ohio, 109; *Gibler v. Trimble*, *ib.* 323.

Frowner and wife, the devisees, had the whole title to the land in controversy, and were the only proper parties to be brought before the court in Hunt's suit, on the principle that, if the mortgagor has assigned all his interest, the assignee only need be made a party.—*Story's Equity Pleadings*, §§ 197, 198; 5 Ala. 164; 2 *ib.* 331. Jurisdiction over the probate of wills being confided by statute to the orphans' court, the probate of Acre's will, until reversed, was conclusive on Hunt and all the world.—6 Porter, 219, 262; 1 Ala. 732; 2 *ib.* 235; 16 *ib.* 271, 451, 590; 18 *ib.* 417, 429; 16 Mass. 433; 9 Dana, 41; 8 N. H. 124. The judgment of probate remained in full force, until after Hunt's right had been established by a decree in chancery, and had been transformed into a perfect title, by his purchase from Frowner and wife, and by his purchase at the master's sale; and while the probate stands, all acts done by virtue of it will be sustained.—15 Serg. & R. 39; 5 Monroe, 42; 1 Bailey, 221; 2 Nott & McCord, 577; 2 La. 249; 5 *ib.* 387; 8 *ib.* 328, 422.

In view of these principles, the decree in chancery, setting aside the probate of Acre's will, was not conclusive on Hunt, and could not have the effect of rendering his decree of fore-

closure void and of no effect. The authorities cited by the counsel for the appellees do not give the decree that effect. The case of *Bogardus v. Clarke*, 4 Paige, rather favors the view of the appellants. While Hunt was an actor in his suit, the judgment of the orphans' court, which was a judgment *in rem*, was in full force. To allow the subsequent judgment, by which the probate was set aside, to retro-act so as to disturb rights previously acquired under judicial sanction, is forbidden by the plainest principles of public justice. The effect of the decree in favor of the heirs, at most, was to authorize them to obtain a review of Hunt's decree, and to rectify any errors that might be discovered in his account; but it could not entitle them to treat his decree as a nullity, and to treat him as a simple mortgagee in possession, and as such chargeable with rents and profits. He is a creditor with a decree in his favor against proper parties, which cannot be reversed on error; and under the sanction of that decree, he became the purchaser, and entered into possession. To treat judicial decrees, such as are shown in Hunt's favor, as worth nothing, and to charge him with rents and profits, as if he had gone into possession of the land with an open mortgage in his hands, would be a mockery of the forms of legal proceedings. The familiar doctrine of equity is, that where a party, against whom a judgment has been taken without service of process, seeks the aid of the court, he must show, not only that he was not served with process, but that he has been injured by the action of the court.—8 Ala. 767, 745, 500; 20 *ib.* 390; 1 *ib.* 351. These plaintiffs, perhaps, may be permitted to show that Hunt's decree was for too large an amount, and may be entitled to have that amount refunded to them out of his estate; but Hunt still remains a purchaser of the mortgaged premises, under a judicial decree and sale, with all the incidents attached to that character, and ought not to be held accountable for rents and profits.

5. The chancellor erred, also, in refusing to give the appellants the benefit of their evidence on the question of Acre's insanity at the time of the execution of his will. If the decree setting aside the probate is not conclusive on Hunt, it was a portion of his title to establish the sanity of the testator, and he should have been permitted to do so.

K. B. SEWALL, with whom was A. R. MANNING, *contra* :

1. Hunt obtained no title, as against the heirs of Acre, by his transactions with Frowner and wife in April, 1843, either as a purchaser from the devisee, or under his decree. He was not a *bona fide* purchaser without notice. When his deed from Mrs. Frowner was made, the suit in favor of the heirs had been pending for more than a year, and was before the chancellor for an interlocutory decree; and he was, therefore, affected by the *lis pendens*.—1 Story's Equity, §§ 405, 406, 408; Murray v. Ballou, 1 Johns. Ch. 566, 577; Bishop of Winchester v. Paine, 11 Vesey, 194. Besides, his agents and solicitors had actual notice, and that was notice to him.—1 Story's Equity, § 408; Sugden on Vendors, 318; Sheldon v. Cox, 2 Eden, 224, 228; Griffith v. Griffith, 9 Paige, 315. It is not necessary that the notice should be in the same transaction.—Hargraves v. Rothwell, 1 Keen, 154-9; Winter v. Lord Anson, 3 Russ. 494. Further, the answer does not allege that Hunt was a *bona fide* purchaser, for valuable consideration, without notice. It is wholly defective on this point, either as a plea, or as an answer.—Story's Equity Pleadings, §§ 805, 806. He got no title, as against the heirs of Acre, by his purchase under his decree. He failed to make them parties to his suit, though they were necessary parties; and they are therefore unaffected by his decree, but have a right to redeem.—Story's Eq. Pleadings, §§ 196, 193.

2. Hunt was bound by the decree, in the suit brought by Acre's heirs against Frowner and wife, setting aside the probate of the will. The statute (Clay's Digest, 598, § 15,) conferred jurisdiction on the chancery court to determine the validity of the will and probate. The extent of this jurisdiction is equal to that of the ecclesiastical courts in England over personalty, and of the courts of law over realty. It is a proceeding *in rem* to ascertain in solemn form the *status* of Acre, his capacity or incapacity to make a will; and the decree is conclusive upon the whole world.—Johnson v. Glasscock, 2 Ala. 233; Johnson v. Hainesworth, 6 *ib.* 443; Hill v. Barge, 12 *ib.* 692; Bogardus v. Clarke, 4 Paige, 623; 1 Greenl. Ev. § 550; Story's Conflict of Laws, § 594.

3. The contract made by Acre, that is, the endorsement and mortgage to secure the payment of \$5,026 61, on which

he received but \$2,814 91, was usurious. The money was advanced on this endorsement and mortgage; and so far as Acre's representatives are concerned, it is the same thing as if he had made his promissory note for \$5,026 61, and given his mortgage to secure its payment.—McElwee v. Collins, 4 Dev. & Bat. 210; Ruffin v. Armstrong, 2 Hawks, 411; Ballinger v. Edwards, 4 Ired. Eq. 449; McBrayer v. Roberts, 2 Dev. Eq. 75; May v. Campbell, 7 Humph. 450. The act of 1834 (Clay's Digest, 591, § 9), which was in force when the contract was made, denounces such a contract as "void and of no effect, for the interest only." The statutes against gaming and usury are exceptions to the rule, that a *bona fide* holder for value, without notice, is entitled to recover on a negotiable instrument.—3 Kent's Com. 84, 7th ed.; Story on Promissory Notes, § 192. The statute which prohibits usury, declares the instrument securing the payment absolutely void; and hence it must be void in the hands of whomsoever it may come.—Lowe v. Walker, 2 Doug. 739. "Usury," says Chancellor Kent, "vitiates every transaction; and even a *bona fide* holder of the tainted instrument cannot protect himself."—Thompson v. Berry, 3 Johns. Ch. 398. "The principle seems to be settled," says the supreme court of the United States, "that usurious securities are not only void as between the original parties, but the illegality of their inception affects them even in the hands of third persons who are entire strangers to the transaction. A stranger must take heed of his assurance at his peril, and cannot insist on his ignorance of the contract in support of his claim to recover upon a security which originated in usury."—Lloyd v. Scott, 4 Peters, 228. The same principle is recognized in every case where the statute denounces the instrument as void.—Post v. Dart, 8 Paige, 639; Simpson v. Fullenwider, 12 Ired. Eq. 334; Aldrick v. Reynolds, 1 Barb. Ch. 44.

If, then, Hunt was not a party to the contract between Acre and Smith, but was a subsequent *bona fide* purchaser from Smith, he stands in no better position than Smith would in a suit with Acre's heirs; for the statute makes the contract and mortgage void for the whole interest, and what is void by statute cannot be made valid by transfer. In equity, the contract was valid, in the hands of Smith, only for \$2,814 91;

and for that amount only can it be valid in the hands of Hunt, the assignee of Smith.

4. But the evidence shows that Hunt was a party to the contract with Acre. Magee had first offered the note to him, and he therefore knew that it was in market for discount. Smith took it, knowing that Hunt would take it from him. This, in connection with their former and then existing relations, shows an understanding between them as to this note; and Smith passed the note and mortgage to Hunt a few days after he had obtained them from Acre. In addition to this, Hunt subsequently admitted to Milton that he took them from Acre, and that it was a transaction with Acre. Without this testimony of Milton, the veil was too transparent to conceal Hunt from view; but with it, all doubts as to the real parties are dissipated, and Hunt and Acre alone stand out the real actors in the transaction. If, however, this were not so, the case shows that the complainants have exhausted all means within their reach to prove what Hunt actually did pay; that they have examined his agents, and all persons connected with the transaction, and have called for the production of Hunt's books. No book of original entries, covering the time when said note was received by Hunt, or in which the transaction is entered, is produced. The complainants prove that Hunt took the note "at a large discount;" that is, at an usurious rate. It was in the power of Hunt, and of his guardian and agents, to have shown the facts, and thus to have fixed the precise rate of discount at which he took the note; but they have not attempted to produce any evidence on the subject. It is a case, then, where the burthen of proof has been changed; and if the defendants have failed to show that Hunt paid less, it must be presumed that he took it at the rate at which Magee got it discounted. It is not likely that Smith would attempt to speculate on Hunt, or that Hunt would suffer Smith to speculate on him, as to a note which Hunt previously knew was in the market.

5. But, whether Hunt was a party to this transaction or not, he is entitled to receive on this mortgage only what he actually paid.—*Judd v. Seaver*, 8 Paige, 548. The complainants have proved that he paid less, by "a large discount," than the amount specified in the mortgage; that he knew, just

Hunt, Frowner, et al. v. Acre, Johnson, et al.

before the mortgage was made, that Acre wanted money; that he received Acre's endorsement and mortgage in a few days after they were delivered to Smith; and that Acre got only 56 per cent. of the mortgage debt; and when Hunt's books are called for, that the original entry of this transaction may be seen, and what he did actually pay thereby shown, they are not produced. Here again, therefore, the *onus* is thrown upon Hunt, to show that he advanced more, if any thing, than 56 per cent. of the mortgage debt.

RICE, C. J.—The effect of a decree rendered in a suit for the foreclosure of a mortgage is not so extensive as that of a decree rendered in a proceeding *in rem*. In the former, the decree does not prejudice the rights of those who ought to be, but are not parties. In the latter, the decree binds not only the parties, but strangers to the proceeding.—1 Greenl. on Ev. §§ 522-525; The Branch Bank at Mobile v. Hodges, 12 Ala. 118; Gliddon v. Andrews, 10 Ala. 166; Watson v. Spence, 20 Wend. 260.

Our law is materially different from the English law upon the subject of the probate of wills. Before 1836, our statutes had established a peculiar jurisdiction and system for their proof and contestation, and for the final determination of their validity or invalidity. The probate embraced all wills, whether of real or personal estate. The jurisdiction was given to the orphans' court to determine, in the first instance, the question of will or no will; and, according to its decision of that question, to allow or disallow probate. If it disallowed probate, its decree was conclusive upon all persons, until reversed or set aside in some recognized legal mode. If it allowed probate, any person interested in the will might contest its validity, by bill in chancery filed within five years from the time of such probate. Such a contest of the validity of a will, by bill in chancery, is in the nature of a proceeding *in rem*, to which any person having an interest may make himself a party, by applying in the proper mode and in the proper time; and the decree rendered in such a proceeding is certainly final and conclusive, in all courts, and upon all persons, as to the question of will or no will, until it is set aside or reversed in some direct proceeding authorized by

law. It cannot be questioned collaterally. Under our system, the question of will or no will, as applicable to the same instrument, cannot be subject, as it was in England, (*Baker v. Hart*, 3 Atk. 546,) to contradictory decisions prevailing at the same time.—*Johnston v. Glasscock*, 2 Ala. 218; *Hill v. Barge*, 12 *ib.* 687; *Bogardus v. Clarke*, 4 Paige, 623; *Singleton v. Singleton*, 8 B. Monroe, 340; *Taylor v. Tibbatts*, 13 *ib.* 177; *Stevenson v. Huddleson*, *ib.* 299; *Laughton v. Atkins*, 1 Pick. 535; *Enloe v. Sherrill*, 6 Iredell, 212.

At the death of Samuel Acre, of Mobile county, about November, 1838, he, as mortgagor, was the owner of the equity of redemption in the premises now in controversy. Jonathan Hunt was the owner of the mortgage, which contained no power of sale. On the 9th October, 1838, he filed in the chancery court of said county his bill to foreclose it, in which Acre was named as a defendant. No order or decree had been made under the bill at the death of Acre. A few days after his death, and in November, 1838, an instrument was, by the orphans' court of said county, admitted to probate, without any contest, as his will, by which his widow was made the sole devisee of the premises now in controversy. In 1839, Hunt revived his suit for foreclosure against her and her second husband, James Frowner, but did not make the heirs of Acre parties to it. Frowner and his wife filed an answer, setting up as defenses usury and satisfaction of the mortgage debt. Afterwards, and in April, 1843, Hunt paid them one thousand dollars, and obtained their deed for the premises, and their consent that a decree should be rendered in his suit according to the prayer of his bill, for the sale of the premises; and thereupon a decree was rendered for such sale, and at the sale Hunt became the purchaser, and obtained the register's conveyance of the premises, and possession of them. But before this decree was rendered, and in 1841, the heirs of Acre (except Elizabeth Caroline Acre, an infant) had filed their bill in the same chancery court, against Frowner and his wife and others, to contest the validity of said will. They did not make Hunt a party to it, but he had notice of its pendency, before he obtained his decree. In April, 1844, they obtained a decree under their bill, establishing the invalidity of the will, and the intestacy

of said Samuel Acre; which decree has never been set aside or reversed. On the 13th January, 1845, they filed their bill in the present case, to redeem the mortgaged premises, to remove the cloud upon their title, created by the decree and register's conveyance obtained by Hunt in his foreclosure suit, and for general relief. The said Elizabeth Caroline Acre was an infant, over fourteen years old, when this bill was filed, and is one of the defendants to it. After it was filed she married Joseph Tucker, and he was made a defendant.

The transaction in which the mortgage had its origin may be thus stated: Samuel Acre was the owner of a promissory note, executed by John Milton, for five thousand and twenty-six 61-100 dollars, payable two years after its date, to the order of James F. Roberts, and endorsed by said Roberts. About March, 1837, and eleven months before its maturity, Acre endorsed it to Charles Smith at a discount of four per cent. per month, and executed a mortgage on the premises now in controversy, to secure the payment of the note,—Acre receiving from Smith only fifty-six per cent. of the note.

For several years before that time, Smith had been the agent of Hunt; but he says, he "ceased acting for Hunt in January, 1837." Before Smith thus obtained the note, it had been offered for discount to Hunt, but "he declined purchasing it." Smith testifies, that he let Hunt have the note at "*a large discount*," but he does not recollect "*at what rate*." He does not seem to recollect "*at what rate*" he obtained it, for he says he took it "*at about three to four per cent. per month discount*." He further testifies as follows: "I took said note on my own account; but *knew, at the time of so doing*, I could dispose of it to Hunt. I passed said note to Hunt some few days after I received it"; and that Hunt "did not take it in payment of any debt." There is nothing in the testimony of Smith, nor in any other testimony in the case, which shows that he made any profit out of Hunt in the transaction, or that Hunt did not take the note and mortgage at precisely the same rate of discount at which Smith had taken them. Without denying credit to any positive or distinct statement of Smith, the fair inference from all the evidence in the cause, including his testimony, is, that Hunt

desired to evade the statute against usury,—that therefore he declined to purchase the note, when it was offered to him for discount, before it had been offered to Smith; and that after he had thus declined to purchase, he assured Smith that, if he would take it on *his own account*, he (Hunt) would take it off his hands. If there was not some such assurance or understanding, how could Smith “*know, at the time*” he took the note, that he could dispose of it to Hunt? In no point of view can we consider or treat Hunt as a *bona fide* holder of the mortgage, without notice of the defenses to which it was subject in Smith’s hands, or as entitled to any better rights therein than Smith had, or as exempt from any defense which arises out of the transaction by which Smith obtained the mortgage.—Saltmarsh v. Tuthill, 13 Ala. R. 390; Cram v. Hendricks, 7 Wend. Rep. 573, opinion of Chancellor Walworth, 573 to 595.

Hunt died pending the present suit, and it was revived against his heirs and representatives. The appeal to this court is taken only by Hunt’s administrator.

Upon these facts, we decide the following points :

1: The decree rendered in the contest of the will in chancery, is as binding upon Hunt as if he had been in fact a party to that proceeding, and concludes him, as against the heirs of Samuel Acre, from alleging or proving that said Samuel died testate:—Bogardus v. Clarke, and other authorities cited in the first and second paragraphs, *supra*.

2. The decree obtained by Hunt in his suit for foreclosure, after the heirs of Acre had, within the time allowed by statute, actually asserted their statutory right of contesting the will, and after notice thereof by Hunt, without making them parties, is void as to them; and his purchase under that decree is, as to them, also void, and not entitled to protection.—Gifford v. Hort, 1 Schoales & Lefroy, 386; Kennedy v. Daly, *ib.* 355; 2 Bla. Com, 356; Curtis v. Hitchcock, 10 Paige, 399; Lyerly v. Wheeler, 11 Iredell, 288.

The decree of Hunt, and his possession, were acquired by a fraudulent combination between him and Frowner and wife, and therefore ought not to create any right, or confer any benefit on him, as against the heirs of Acre, nor to work any prejudice to their defenses against the mortgage. Al-

though the instrument propounded as the will of Samuel Acre purported to give the mortgaged premises to his widow, and although it was, in the first instance, by the orphans' court of Mobile county, admitted to probate as his will; yet, for five years thereafter, the right by statute existed in his heirs to contest its validity by bill in chancery. The existence of this right, and its actual assertion by their bill, made them proper parties to Hunt's suit for foreclosure. His election not to make them parties, but to proceed without them to a decree, and to a purchase under that decree, was made at his own peril, and cannot be allowed to operate so as to impair their right to redeem, or their right to avail themselves in the present suit of any matter which they could have successfully relied on, as a bar to the whole or to part of the relief sought by the suit for foreclosure, if they had been made defendants to it.

3. Discounting the note on Milton, eleven months before its maturity, at four per cent. per month, and taking the endorsement of Samuel Acre, its holder, and the mortgage on his property to secure its payment, are not in law and fact a mere purchase of the note, but a *usurious loan*; and although Charles Smith took the note, endorsement and mortgage on "his own account", yet, as the fair inference from the evidence is that Hunt took the assignment of the mortgage from Smith with notice of the usurious nature of the transaction between Acre and Smith, and at the same usurious rate of discount at which Smith had obtained it, the mortgage is as open to the defense of usury in Hunt's hands as if it were still in Smith's hands.—*Lowes v. Mazzaredo*, 1 Starkie's R. 385; *Massa v. Dowling*, 2 Strange, 1243; *Ruffin v. Armstrong*, 2 Hawks, 411; *McElwee v. Collins*, 4 Dev. & Batt. 209; *Ballinger v. Edwards*, 4 Iredell's Equity Cases, 449; *Gaither v. The Firemen & Mechanics' Bank*, 1 Peters, 37; *Johnson v. King & Jones*, 4 McCord's Rep. 365; Opinion of Chancellor Walworth, in *Cram v. Hendricks*, 7 Wend. 573; *The King v. Ridge*, 4 Price's Rep. 50; *Chapman v. Black*, 2 Barn. & Ald. Rep. 589; *Hamer v. Harrell*, 2 Stew. & Por. 323; *Drew v. Power*, 1 Schoales & Lefroy, 195; *Harrison v. Hannel*, 5 Taunt. 780; *Coxe v. Rowley*, 12 Robinson's Rep. 273, and cases there cited by the counsel for the appellants;

Lowe v. Waller, Douglass, 708; 1 Espinasse's Rep. 11, 40; United States Bank v. Owens, 2 Peters, 535.

4. The usury could have been pleaded and proved by the heirs of Acre, as a defense *pro tanto* to Hunt's bill for foreclosure, if he had made them defendants to it; and if they had been made defendants thereto, and had pleaded and proved the usury, they would not have been charged with any interest, either legal or illegal, on the debt, prior to the rendition of the decree in that suit.—Hamer v. Harrell, 2 Stew. & Por. 323; Richardson v. Brown, 3 Bibb, 207; Cowles v. Woodruff, 8 Conn. Rep. 35.

5. The rule, that a plaintiff who comes into a court of equity for relief against a judgment at law, or other legal security, on the ground of usury, cannot be relieved except upon the terms of paying to the defendant the principal and legal interest, applies to cases where the debtor has, by *his own voluntary act, deprived himself* of the opportunity to appear in the character of defendant and plead the usury; as by giving his warrant of attorney to confess judgment, upon which judgment has been entered up; or by inserting in the mortgage the power to sell, by means of which the creditor has foreclosed his mortgage by an act *in pais*, without calling on any court to assist him. But that rule does not apply to a case like the present, where no such voluntary act has been done, either by the debtor or his heirs, and where the creditor has, under such circumstances as appear in this case, obtained a decree and register's deed for the mortgaged premises in a suit for foreclosure, so conducted as to deprive them of the opportunity of appearing as defendants and pleading the usury, and to create a cloud upon their title, the removal of which constitutes a ground of relief *independent* of the usury.—Fanning v. Dunham, 5 Johns. Chan. Rep. 122; Taylor v. Smith, 2 Hawks, 465.

The heirs of Acre filed the bill in this case for relief, not merely on the ground of usury, but to avoid the proceedings of Hunt in his suit for foreclosure. Those proceedings are not void on their face. To render them inoperative as to the heirs, it is essential to prove the proceedings and decree in their suit in chancery, by which the invalidity of the will and the intestacy of Acre were established. It is clear, therefore,

that the proceedings of Hunt in his suit for foreclosure, and the deed thereby obtained by him from the register, form such a cloud upon the title of the heirs of Acre, as to authorize them to apply to a court of equity to set them aside.—Peirsoll v. Elliott, 6 Peters, 95; Van Doran v. Mayor of New York, 9 Paige, 388; Simpson v. Lord Howden, 3 M. & C. 99.

As the case is presented on the record, it is not a mere application by a debtor to be relieved from usury. There is a distinct and clear ground for relief, *independent* of the usury, as above shown, arising out of Hunt's improper proceedings in and under his suit for foreclosure. To decide that the heirs of Acre ought to be charged with legal interest, prior to the rendition of Hunt's decree in that suit, would be to allow him to impose that charge upon them in consequence of his mere election not to make them parties to that suit, and thus to take advantage of his own wrong. We deem it clear that they ought not to be charged with any interest, prior to the rendition of his decree. Whether interest against them would be allowable from the date of that decree, or from some later period, we do not decide.

6. Without deciding whether Hunt acquired any right whatever, as against the heirs of Acre, by virtue of his decree in the suit for foreclosure and his deed from Frowner and wife, our opinion is, that he certainly did not thereby acquire, as against them, more than the right to retain the one third of the rents and profits of the premises, which was allowed to him or his representatives in the report and decree in the present case.—Wallace v. Hall, 19 Ala. 367.

Having now considered and decided what we deem the most important questions embraced by the decree of the chancellor, and having attained the conclusion, that, if there is error as to them, that error is beneficial to those who have assigned errors in this court; and the assignments of error as to the other and less important questions being waived and abandoned by the appellant, we affirm the decree of the court below, at the costs of the appellant.

WALKER, J., dissents, on the question whether or not the heirs of Acre should be charged with interest from the time Acre obtained the money and executed the mortgage.

NUNN vs. MILLS.

[TROVER AGAINST CONSTABLE FOR TAKING HORSE EXEMPT FROM EXECUTION.]

1. *Instructions to jury properly confined to matters in issue.*—Where issue is joined on a defective replication, the defendant cannot, by a request for instructions to the jury, claim the benefit of the plaintiff's failure to prove a fact which, because not alleged in the replication, is outside of the issue.

APPEAL from the Circuit Court of Fayette.

Tried before the Hon. E. W. PETTUS.

E. P. JONES, for the appellant.

WALKER, J.—The appellee was the plaintiff, and the appellant the defendant, in an action for “wrongfully taking a gray horse.” The defendant pleaded, in short by consent: “1st. Not guilty; 2d. That he levied on said horse by virtue of an attachment in favor of J. K. McCollum against said plaintiff, and that he was constable at the time.” The plaintiff replied to the 2d plea as follows: “The plaintiff replies to the second plea, and says, that the above horse was a work horse, and the only one he had; and that he is a man of family, and claimed the same as exempt from execution under the statute in such cases made and provided; and plaintiff says, he is, and was at the time, a resident of the State, and the head of a family.” The only matters brought to our view by the assignment of errors, are a charge given, and a charge refused by the court.

The charge given was, in effect, that if the plaintiff was a resident of the State at the time of the levy, and that defendant levied on and sold the horse of the plaintiff, and that plaintiff was a married man, with a wife and daughter living with him, in this State, and owned no other work horse, or mule, or pair of work oxen, at the time of the levy or sale; then they must find for the plaintiff. Conceding that making an affidavit, under sections 2465 and 2466 of the Code, was a fact necessary to give the plaintiff a right to a recovery in the suit, it by no means follows that the omission of that from

the statement of facts requisite to entitle the plaintiff to a verdict on the issues before the jury was erroneous. The parties went to trial upon the plea of not guilty, and a replication to the plea of justification. The replication does not aver that an affidavit was made. The defendant went to the jury upon that replication, and had no right to complain that the charge of the court did not impose upon the plaintiff the *onus* of proving a fact outside of the issue. The jury were confined to the question of fact before them; and a charge that, if the plaintiff proved all the facts which the issue imposed on him, he was entitled to a verdict, was not erroneous. Upon the plea of not guilty, the plaintiff was not required to prove all the facts which the charge of the court imposed on him. Under the plea of not guilty, the charge was, therefore, not objectionable to the defendant.

The defendant asked the court to charge the jury, that the making of the affidavit was a fact without proof of which the plaintiff could not recover. This charge was properly refused, upon the state of the pleadings. The defendant had no right to ask a charge outside of the issue.

The sufficiency of the pleas, and of the replication, and the legality of the judgment rendered, are questions not presented by the assignment of errors.

Upon the questions decided in this opinion, see *Cullum v. Bank*, 4 Ala. 39; *Upson v. Austin*, 4 Ala. 128.

The judgment of the court below is affirmed.

KING vs. POPE.

[ACTION BY ATTORNEY AT LAW FOR SERVICES RENDERED.]

1. *Specific objection to evidence waives other objections.*—Where a specific objection is made to the admission of evidence on the trial of a cause, the party will be confined, on error, to the particular ground of objection stated in the court below, and held to have waived all other grounds of objection.
2. *Clerk's certificate of reversal of cause in supreme court, admissibility and relevancy of.* Conceding that the certificate of the clerk of the supreme court, showing

- the reversal of a cause, is not competent evidence to prove the reversal, in an action brought by the attorney to recover his fees, yet it is neither irrelevant, nor *res inter alios*; and when objected to on these two grounds only, its admission is not erroneous.
3. *Relevant evidence, though insufficient, admissible.*—The admission of evidence which, though relevant to the issue, is of itself insufficient to entitle the party to a recovery, is not a reversible error.
 4. *Ratification of attorney's unauthorized employment.*—Conceding that an attorney at law has no authority to employ another attorney to act for his client, yet, if he soon afterwards informs his client of such unauthorized employment, and the latter does not dissent from it, these facts are proper to be submitted to the jury, in an action brought by the second attorney to recover his fees, to enable them to determine whether the client did not assent to the employment.
 5. *Admission of evidence prima facie irrelevant cured by subsequent proof.*—The admission of evidence which, when offered, was *prima facie* irrelevant, is not a reversible error, when the record shows that its relevancy was made to appear by evidence subsequently introduced.
 6. *Charge erroneous, as invading province of jury.*—A charge asked which denies to the jury the right or authority to draw any reasonable inferences from the facts stated in it, is properly refused.

APPEAL from the Circuit Court of Shelby.

Tried before the Hon. ANDREW B. MOORE.

ALEX. WHITE, for the appellant.

MORGAN & MARTIN, *contra*.

RICE, C. J.—The appellee brought this suit to recover for services rendered by him, as an attorney at law for appellant, in the circuit court of Shelby county, and in the supreme court, in a case of appellant and others against Jack Shackelford. There was evidence tending to show, that the case in which the services were rendered by the appellee as an attorney, was a proceeding for appellant, for himself as executor and creditor of the insolvent estate of one Mason, against Shackelford, one of the executors of said Mason; that it was commenced in the orphans' court of Shelby county; that a decree had been rendered in it in said orphans' court; that appellant had employed another lawyer to attend to the case in the orphans' court, and this lawyer had spoken to appellee to attend to the case for appellant in the supreme court, upon its going up the first time to that court, and had informed appellant of this soon afterwards; that services were rendered (the value of which was proved) by appellee, in the supreme

King v. Pope.

court, when the case went up the first time ; that the case was afterwards transferred from the orphans' court to the circuit court, in consequence of the incompetency of the judge of the orphans' court ; that the other lawyer mentioned above, as having been employed by the appellant, was present at the trial of the case in the circuit court, attending to it, but appellee took the lead in conducting the case on the trial ; that appellant was also present at that trial, and did not make any objection to appellee attending to the case, and that he and appellee conferred about the case on that trial ; that the decree of the circuit court was in favor of appellant and others, and against Shackelford ; that an appeal from this decree was taken to the supreme court, and appellee alone argued the case on this appeal on the side of appellant as executor, &c. "There was no express contract proven of defendant having employed" appellee to attend to the case for him. The appellee offered in evidence the certificate of the reversal of the case, when it went up from the orphans' court to the supreme court ; but the appellant objected to its introduction, "as irrelevant and *res inter alios*." The court overruled this objection, and the appellant excepted.

In this court, the appellant must be confined to the two specific grounds of objection stated by him in the court below, and as having waived all other grounds of objection to the certificate of reversal.—*Creagh v. Savage*, 9 Ala. Rep. 959. If he had stated, as one of his grounds of objection, that the reversal could not be proved in this suit by the certificate of a reversal, but only by a duly certified transcript of the record of the supreme court, or of the judgment of reversal, we may concede that his objection should have been sustained.—*Draughn v. Tombeckbee Bank*, 3 Stew. R. 54 ; *Locke v. Winston*, 10 Ala. R. 849. He did not, however, state any such ground of objection. The two grounds stated by him do not raise the question, whether such duly certified transcript should not have been produced ; but raise only the question, whether the matter contained in the certificate is "*irrelevant*," or "*res inter alios*." The question really presented, is precisely the question which would have been presented, if a duly certified transcript of the judgment of reversal had been offered in evidence, and objected to by appellant, "as irrelevant

and *res inter alios*." We deem it too clear for argument, that the matter of the judgment for reversal, whether appearing in the certificate of reversal, or in a duly certified transcript, was neither "irrelevant" nor "*res inter alios*" on the trial of this suit.

There was no reversible error, in allowing the appellee to prove the services rendered by him in the supreme court in the case, when it went up from the orphans' court, and when it went up from the circuit court, and the value of such services. Such evidence was relevant, although not sufficient, of itself, to entitle him to recover.—Cuthbert v. Newell, 7 Ala. R. 457.

Conceding that the lawyer, who was unquestionably employed by appellant to attend to the case against Shackelford, had no authority to employ the appellee as an attorney for the appellant, without the consent of appellant; yet, if he did employ the appellee as an attorney for the appellant, and soon afterwards informed the appellant of this, and the appellant did not dissent from it, these certainly were facts proper to be submitted to the jury, to enable them to determine whether the appellant did not assent to such employment of the appellee as an attorney for him.—Hitchcock v. McGehee, 7 Por. Rep. 556.

Whether the respective portions of evidence objected to by the appellant, were or were not, *prima facie*, irrelevant, at the time they were admitted by the court, makes no difference in this case. For, if they were *prima facie* irrelevant when admitted, the record shows that their relevancy was made to appear from their connection with evidence subsequently introduced. This cured the error of their admission, if such error existed.—Lawson v. The State, 20 Ala. Rep. 65; 1 Greenlf. Ev. § 51, a.

The defendant asked the court to instruct the jury, "That if there was no other evidence of an implied contract by defendant to pay plaintiff for the services rendered at the last trial in the supreme court, than the fact that plaintiff had attended to the case, on its first trial in that court, at the request of the lawyer who had been employed by defendant, and the fact that that lawyer had informed defendant that he had done so, and the further fact that plaintiff had attended

to the case on such first trial, and had afterwards attended to the case in the circuit court, and that defendant was present, and did not object to his conducting the case,—that these facts would not authorize them to find for plaintiff, for services rendered by him on the last trial in the supreme court.” The court refused this charge, and then gave the following : “That if the plaintiff attended to the first trial in the supreme court, and argued the case, with defendant’s knowledge, and afterwards conducted the case as leading counsel in the circuit court, while defendant was present, and defendant made no objection to his conducting the case, and plaintiff afterwards argued the case in the supreme court, as the sole attorney in that court,—the jury might look to these as circumstances tending to show defendant’s assent to plaintiff’s appearance for him in the case ; and that, if the jury believed that he did so assent, the defendant would be liable to the plaintiff for the reasonable value of the services rendered in the management of said case.”

There was no error in refusing the charge asked by appellant. That charge asserts, that the facts stated in it would not authorize the jury to find for appellee, for services rendered by him on the last trial in the supreme court. That was going too far. These facts might have authorized the jury to find for appellee for those services, in one contingency ; that is, in the event the jury believed from those facts, or inferred from them, that these services were rendered by appellant’s request or assent. The charge as asked does not question the right of appellee to recover for his services on the first trial in the supreme court, and for his services on the trial in the circuit court ; nor does it question the existence of the relation of client and attorney, between appellant and appellee, so far as the first trial in the supreme court and the trial in the circuit court were concerned. If, then, the jury believed from the evidence that the relation of client and attorney existed between appellant and appellee, at the first trial in the supreme court, and at the trial in the circuit court, and that, in rendering the services on these trials, the appellee acted as the attorney of appellant, and was in fact his attorney ; and if, in addition to this, the facts stated in the charge were

believed,—then these facts might well have authorized the jury to infer and find, that the relation of client and attorney between appellant and appellee continued to exist on the last trial in the supreme court, that the services rendered on that trial were rendered by the assent and request of appellant, and that appellant was liable for them. The charge as asked denied to the jury the right or authority to draw any reasonable inferences from the facts stated in it.—*Hitchcock v. McGehee*, 7 Porter ; *Swallow v. The State*, 22 Ala. R. 20.

The charge given by the court was appropriate and correct.

Upon examination of the several matters complained of by appellant, we find no error. The judgment below is affirmed.

MCKENZIE vs. BRANCH BANK AT MONTGOMERY.

[NOTICE AND MOTION FOR SUMMARY JUDGMENT AGAINST BANK DEBTOR.]

1. *Bill of exchange, accommodation, endorsement of.*—If a bill of exchange, which is endorsed for the accommodation of the acceptor, for the special purpose of enabling him to obtain an extension of a debt in bank, is transferred by him as collateral security for the payment of another pre-existing debt, the creditor takes it with implied notice of the fact and purpose of the accommodation endorsement, and subject to any defense which would be available against the acceptor himself.
2. *Charge assuming facts to be proved, erroneous.*—A charge which assumes that a certain fact is proved, when the evidence is conflicting, is erroneous; as where it begins thus, "*When the defendant shows,*" &c.
3. *Fact to which witness may depose, and which may be inferred by jury.*—Where the issue involves the application of the proceeds of collateral securities to the payment, *pro tanto*, of several debts, the amount of a debt being shown, the jury may ascertain from it as a basis the *pro rata* share to which it was entitled; or a witness may testify what the *pro rata* share was, as direct and primary evidence, without stating the amount of the debt.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN GILL SHORTER.

This suit was instituted by the appellee, by notice and motion for a summary judgment against John McKenzie,

William C. Wright, and Benjamin Gibson, on a promissory note for \$1,000, dated September 29, 1846, payable five years after date to the Branch Bank at Montgomery, and payable and negotiable at said Bank. Wright and Gibson having died pending the suit, it was allowed to abate as to them, and proceeded to judgment against McKenzie alone. The only plea was the general issue, with leave to give any special matter in evidence. The bill of exceptions shows the following facts:

After the plaintiff had produced the note sued on, the defendant proved, that he was the surety of one Robert Harwell, on certain debts due to said Bank, and that the note sued on was given by him for this indebtedness. He then offered in evidence said Harwell's answers to certain interrogatories propounded to him, the substance of which was, that some time in 1841, or '42, he (Harwell) deposited in said Bank, as collateral security for the payment of the debt on which McKenzie was bound as his surety, certain drafts and notes, among which were two drafts for \$1,000 each, drawn by Mason Harwell on said Robert Harwell, and endorsed by H. W. Farley, due on the 18th April and 18th May, 1842; that these drafts and notes were deposited in said Bank for the benefit and security of McKenzie, and were never redelivered to said Harwell. "He then proved that said draft for \$1,000, drawn by Mason Harwell on said Robert Harwell, and endorsed by H. W. Farley, due April 18, 1842, was prosecuted to judgment against said Farley, by plaintiff, and suit instituted against said Farley on the other draft, due May 18, 1842; that said Farley, after judgment had been rendered against him on said first draft, and whilst the suit on the second was pending, filed his bill in chancery against plaintiff, to enjoin the collection of said drafts from him; that while said suit in chancery was pending, plaintiff compromised said claims against Farley, at the sum of \$750, and released him from all liability on said drafts."

The proceedings in this chancery suit are here made an exhibit to the bill of exceptions, and the bill states these facts: That said Harwell was largely indebted to said Bank, and had given a mortgage on certain real estate to secure the payment of the debt; that said two drafts were endorsed by

Farley, at the request of said Harwell, and for his accommodation, in order to make a payment and obtain an extension of said debt; that said Bank, when these drafts were presented to it by Harwell, had notice of this fact, and refused to take them; that Harwell then proposed to deposit them as collateral security, upon the express condition that his debt should be extended through the business season of the year 1842; that no specific answer was at the time given to this proposition, but the drafts were received, and the Bank promised to consider the proposal, and to return an answer through its cashier; that the Bank never did accept said proposal, and never informed Harwell of its acceptance; that in April, 1842, before the close of the business season, the Bank sold the property covered by said mortgage, under a power of sale contained therein; that it afterwards received from Harwell a draft on John Powell, for \$3,000, in part payment of said debt, on which judgment was afterwards recovered against said Powell, who is perfectly solvent; and that the balance of Harwell's debt has been satisfied by McKenzie.

"The defendant then introduced evidence tending to show, and which he insisted did show, that the said Farley, at the time said compromise was made, and for some time thereafter, was solvent, and that the amount of said drafts could have been collected from him by execution. It was shown, also, that the plaintiff did not apply the whole amount of money received from said Farley on said compromise as a payment on the indebtedness of Harwell on which defendant was surety, but only applied the sum of \$— to that indebtedness, and applied the sum of \$— in part payment of another debt of said Harwell's, on which John Powell was surety, and on which McKenzie was not liable. There was some evidence that the collateral securities; deposited by said Harwell with plaintiff, were deposited by him to be collected and applied by plaintiff, not only to the indebtedness on which said McKenzie was surety, but also to the said indebtedness on which said Powell was surety. There was no evidence of the amount of the debt, due by said Harwell to plaintiff, on which Powell was surety. The only evidence of the consideration and purpose for which said drafts were endorsed by Farley, or made, was Farley's said bill in chancery; and

said bill was also the only evidence offered by plaintiff to show the necessity of compromising said drafts with Farley. There was no evidence that plaintiff knew, or had any notice of, the purpose for which said drafts endorsed by Farley were made, before they were received by plaintiff from said Harwell. It was further in evidence that, after the compromise had been made by plaintiff with said Farley, and the money arising thereon had been applied by plaintiff, *pro rata*, to the debts due by Harwell, the defendant was informed of the facts; and the witness who testified on this point stated, that he could not then repeat defendant's reply, but he recollected that defendant approved plaintiff's acts; and after this information defendant gave the note sued on, with other notes, in extension of his debt to the Bank.

"Upon this evidence, the defendant requested the court to instruct the jury, that if Farley endorsed drafts for the accommodation of Harwell, and entrusted them to him, to be used in negotiation with the Bank, and for a special purpose, but the purpose for which they were made was not known to the Bank, then Farley was liable on the drafts, although Harwell used them for a different purpose than was intended by Farley; the Bank not being informed of the breach of faith by Harwell, and giving him time on his indebtedness to the Bank in consideration of said drafts. The court refused this charge as asked, but gave it with this qualification: that if Farley was an accommodation endorser merely, then the law would charge the plaintiff with knowledge of the fact, and of the special purpose for which the drafts were endorsed. The defendant excepted to the refusal to charge as requested, and to the qualification given.

"The defendant requested the court to charge the jury, further, that when the defendant shows that the collaterals were deposited in the Bank for the benefit of the debt on which he was liable, and the plaintiff claims, in reply to that evidence, that there were other debts to which the collaterals were to be applied, the *onus* of proving the amount of those other debts, and the share to which they were entitled, is on the plaintiff; and, unless the plaintiff shows these facts, the jury are authorized to give the defendant the benefit of the

collaterals on that point. The court refused this charge, and the defendant excepted.

"The plaintiff requested the court to charge the jury, that if these notes and drafts were deposited with the Bank as collateral security for debts of Robert Harwell on which McKenzie was surety, and also for debts on which John Powell was surety, then, if the jury find that any of the collateral paper could have been collected by due diligence, they must allow McKenzie only the credit to which he is entitled, in proportion to the amount of debts on which he was surety to those on which Powell was surety. This charge the court gave, and the defendant excepted."

The charges given, and the refusals to give the charges asked, are now assigned as error.

NAT. HARRIS and WM. B. MOSS, for appellant.

ELMORE & YANCEY, *contra*.

STONE, J.—There are two fatal objections to the first charge asked by the defendant in the court below, either of which justifies the qualification given by the judge: first, the acceptor of the bills, himself, passed the papers to the Bank, (*Saltmarsh v. P. & M. Bank*, 14 Ala. 668); and, secondly, the bills were not sold to the Bank *in payment*, but placed there as collateral security to a pre-existing debt,—*Boyd & Macon v. McIver*, 11 Ala. 822; *Thompson v. Armstrong*, 7 Ala. 256; *Marston v. Forward*, 5 Ala. 347; *Bank of Mobile v. Hall*, 6 Ala. 639; *Wardell v. Howell*, 9 Wend. 170; *Andrews v. McCoy*, 8 Ala. 920. The endorser, Farley, could make the same defense to the bills thus placed in the Bank, as if they still remained in the hands of Robert Harwell, the acceptor; and any charge which assumes the contrary, does not assert a correct legal principle. This charge, as asked, was properly refused. See, also, *Wallace v. Br. Bank of Mobile*, 1 Ala. 565.

The second charge asked and refused, is somewhat involved. Certainly it was the duty of the Bank, which had assumed to apply a part of the proceeds of the collateral paper to another debt, to furnish to the jury a basis, to enable that body to determine the share to which defendant was entitled. If the charge had asked this instruction, unclogged by other

and illegal propositions, we would feel constrained to reverse the case. But in asking the charge, the counsel embarrassed it with other terms; which, taken as a whole, justified its refusal. It sets out with the assumption, that defendant had *shown* certain facts to exist. The language employed is, "When the defendant McKenzie shows," &c. This language, when used in reference to conflicting testimony before a jury, is always improper. The court cannot predicate, or assume, that any fact, embraced in the issue, has been *shown* or proven. The jury, under our system, is the only tribunal which passes on controverted facts in courts of law; and until the verdict is rendered, no such fact is established, or *shown* to exist.—Ward v. The State, at the present term.

There is another objection to the second charge asked. It was not necessary that the plaintiff should prove both the *amount* of the debt on which Powell was surety, and the *pro rata share*, to which it was entitled. Proving the *amount* of the debt, would have given the jury a basis, from which they could ascertain the *pro rata share*; or, the testimony might have shown the *pro rata share*, as direct and primary evidence. That such form of inquiry was permissible, see *Douge v. Pearce*, 13 Ala. 127; *Stanley & Elliott v. The State*, 26 Ala. 26; *Massey v. Walker*, 10 Ala. 288.

The legal correctness of the affirmative charge found in the bill of exceptions, is too clear to admit of elucidation.

There is no error in the record, and the judgment of the circuit court is affirmed.

GRESHAM vs. TUCKER.

[JUDGMENT ON APPEAL FROM JUSTICE OF THE PEACE.]

1. *Jurisdiction of circuit court on appeal from justice's court.*—When the record shows that appellant, against whom a judgment had been rendered by a justice of the peace, having prayed an appeal to a jury under a special statute, afterwards appealed to the circuit court, gave bond for the appeal, appeared in

Gresham v. Tucker.

that court, and pleaded to the statement filed against him, and that the cause, after several continuances and a mistrial, was finally tried by a jury, the objection cannot be raised for the first time on error, that the circuit court had no jurisdiction of the case, because there was no judgment in the justice's court at the time the appeal to the circuit court was taken.

APPEAL from the Circuit Court of Chambers.

Tried before the Hon. ROBERT DOUGHERTY.

The record shows these facts: In December, 1853, John E. Tucker brought suit against Felix Gresham before a justice of the peace, and recovered a judgment on the 11th March, 1854, for \$18, but the costs were imposed on him. The justice's docket then states, that Gresham "prayed an appeal, gave bond, the case was brought before a jury, and they made a mistrial"; a special act of the legislature, approved December 31st, 1841, authorizing jury trials before justices' courts in that county. Gresham then appealed from the justice's said judgment to the circuit court, where the plaintiff filed a statement, claiming \$24 for tuition fees due him as a school-teacher; to which the defendant pleaded the general issue. After two continuances, and a mistrial, the cause was submitted to a jury at the Fall term, 1855, and on their verdict judgment was rendered for the plaintiff; from which judgment the defendant now appeals to this court.

B. J. WHATLEY, for the appellant, contended that the circuit court had no jurisdiction of the case, and should have repudiated it, because there was no judgment in said cause, in the justice's court, at the time the appeal was taken, and there cannot be an appeal in a case where there is no judgment.

BROCK & PRESLEY, *contra*, cited Vaughn v. Robinson, 22 Ala. 519; Wetumpka & Coosa Railroad Co. v. Bingham, 5 *ib.* 657; Code, §§ 2368, 2401, 2405.

RICE, C. J.—The only question raised by the appellant, is, whether the circuit court had jurisdiction of the case. In Hatter v. Eastland, 22 Ala. R. 688, this court said, "All that is necessary to authorize the circuit court to try a case under fifty dollars, so far as the mere question of authority is concerned, is the fact that it was brought before it from the

inferior tribunal, and was determined there." That fact is clearly shown in the present case (*Larcher v. Scott*, 2 Ala. Rep. 40); and although it appears that the appellant took an appeal to a jury, from the justice's judgment, and although it is not expressly stated in the record that such appeal was actually tried, yet, inasmuch as afterwards he took an appeal to the circuit court, and gave bond for this last appeal, and as he appeared in the circuit court, and pleaded the general issue to the statement there filed, and after two continuances and a mistrial, had a trial by jury, he cannot be permitted in this court to raise the objection, for the first time, that the circuit court had no jurisdiction.—*Vaughn v. Robinson*, 22 Ala. R. 519; *W. & C. R. R. Co. v. Bingham*, 5 Ala. R. 657; *Hatter v. Eastland*, *supra*.

There is no error in the record, and the judgment is affirmed.

WILLIAMS vs. BARNES.

[BILL IN EQUITY FOR SPECIFIC PERFORMANCE OF PAROL CONTRACT OF SALE.]

1. *Variance between allegations and proof.*—The rule which requires a correspondence between the allegations and proof, is especially strict in cases for the specific execution of parol contracts for the sale of land. Where the contract alleged was, that the complainant should execute his note for one half of the purchase money of two lots bought by defendant, that the two lots should be equally divided between them by an east and west line, and that each party should immediately enter into possession of his half; while the contract proved contained the additional stipulation, "that whenever either of them wished to sell, the other should have the preference or refusal"; held, that the variance was fatal to relief.
2. *Amendment not allowable, on reversal of decree, when it makes new case.*—In reversing a decree for the specific performance of a parol contract, on account of a fatal variance between the pleadings and proof, although the evidence shows that the complainant has a good cause of action, the appellate court will not remand the cause, in order that the bill may be amended, if the amendment required would make a new case; but will dismiss the bill, without prejudice to the right to file another.
3. *Costs divided.*—The chancellor's decree in this case being reversed, and the bill dismissed, but without prejudice, on account of a variance between the allegations and proof, the costs were equally divided.

APPEAL from the Chancery Court of Russell.

Heard before the Hon. JAMES B. CLARK.

JAMES E. BELSER, for the appellant.

JOHN A. LEWIS, *contra*.

WALKER, J.—The appellee obtained a decree in the chancery court of Russell county, for the specific performance of a parol contract to sell lands, and the rendition of that decree is assigned for error. The appellant had purchased several of the lots into which a sixteenth section was divided, and each lot contained forty acres. The bill alleges, that the defendant agreed that the complainant should execute his notes for the purchase money of one of two adjacent lots, purchased by the defendant; "that the two lots should be divided equally by a line running east and west, and that complainant should take and possess, in his own right, the south half of each of said lots, and the said Williams (the defendant) should take and possess in his own right the north half of each of said lots"; and "that, as soon as the dividing line should be run, each party should go into possession of his portion of the land."

The answer denies that the contract averred in the bill was ever made, and says that a contract, altogether different in its stipulations, was made before the sale at which defendant purchased. Two witnesses were examined by the complainant, and one by the defendant, in reference to the contract. The deposition of defendant's witness tends to prove a contract entirely different from that alleged in the bill. Dunham, one of the two witnesses of complainant, examined in reference to the contract, proves that, on the day after the sale, he and the other witness, (Carmichael,) at the request of complainant and defendant, divided the two lots by an east and west line; and after the division the contract was stated by complainant, in a conversation between him and defendant. The witness gives the statement of the contract by complainant as follows: "Barnes was to have the south half of sections thirteen and fourteen as above described, being lots in section sixteen, township fifteen, of range twenty-seven, with this proviso, to-wit: agreeing, one with the

other, that whenever either of them wished to sell, that the other should have the preference or refusal."

The complainant's other witness, (Carmichael,) after proving the division of the lots, and that complainant took the south, and defendant the north half, says, that the contract was that "whoever sold first should give the other the refusal."

The contract, as proved by the two witnesses of complainant, contains a stipulation for a mutual preference in the purchase of the respective parcels of land in the event of a subsequent sale. The contract, as averred, contains no such stipulation. The contract as averred, and the contract as proved, are different in this: that the latter contains one stipulation not found in the former. They are, therefore, different contracts, and the bill averring one is not sustained by proof of the other. The stipulation omitted from the bill can not be characterized as immaterial. The parties evidently deemed it a matter of sufficient consequence to give it a place in their contract, and it secures a right which may be valuable.

In bills for a specific performance of a parol contract for the sale of land, the contract must be proved as alleged. The rule which exacts a correspondence between the pleadings and proof is especially strict in such cases.—*Sims v. McEwen*, 27 Ala. 184; 2 Story's Eq. Juris. § 764, note, § 767; *Aday v. Echols*, 18 Ala. R. 353; *Evans v. Battle*, 19 *ib.* 398; *Goodwin v. Lyon*, 4 Port. 297; *Philips v. Thompson*, 1 John. Ch. R. 131; *Parkhurst v. Vancortlandt*, *ib.* 284; *Mallory v. Mallory*, 4 N. C. R. (Busbee's Eq.) 80; 2 Daniell's Ch. Pl. & Pr. 1000, 986; *Mundoff and Wife v. Kilbourn*, 4 Md. 459; *McKinley v. Irvine*, 13 Ala. 681; *Owens v. Collins & Langworthy*, *ib.* 837.

The relief under the contract set forth in the bill would be different from the relief under the contract proved. Under the latter, the complainant would not be entitled to a decree for the specific execution of the contract, without an averment at least of a willingness to give the defendant the preference, in the event he should wish to sell the land, and in some way securing to the defendant the benefit of a stipulation as to a preference in any future sale.

If the stipulation that the complainant should have the south half of the lots, and the stipulation for mutual preferences in the event of a future sale by either, were independent contracts, then the specific performance of the former might be sought without reference to the latter.—Croom v. Lediard, 2 My. & K. 251, (7 Eng. Chan. 357.) But they are not independent contracts. The witness who gives the entire contract says, that the complainant was to have the particular land, "with this proviso: agreeing, one with the other, that whenever either of them wished to sell, the other should have the preference or refusal." There is no interpretation of the awkward expression of the witness which will enable us to escape the conclusion, that the stipulation for preference or refusal in a future sale was one of the terms of the contract of sale to the complainant. The word "*proviso*", contained in the narration of the contract by the witness, refers to the making of the contract, and not to the performance of it.

The stipulation that complainant should have the land was made upon the condition, or "*proviso*", that there should also be a stipulation, that whenever either of them wished to sell, he should give the other the preference or refusal. Thus it is clear that the last part of the contract was a part of the consideration upon which the former part was assented to. Without the latter part of the agreement, the former would never have been entered into. The making of the former stipulation was predicated upon the latter. The former stipulation would never have been made, unless accompanied by the other. The two stipulations are, therefore, parts of the same contract. The authorities we have cited above leave us no election. We can not, without disregarding the law, specifically perform a contract, when one of its material stipulations, constituting an important part of the inducement to and consideration of the contract, is omitted from the bill.

We believe that, under the proof, the complainant has a good cause of action; and we would, if we could consistently with the decisions of this court and a wholesome practice, remand the case, that the bill might be amended so as to conform to the case made by the proof. But the settled practice of this court is, to render the decree which the chancery court ought to have rendered, where the amendment would

have the effect of making a different case. We can not know that the complainant could make the affidavit necessary to obtain an order for amendment under section 2906 of the Code. The effect of allowing an amendment of the cause after it has been heard upon bill, answer and proof, and tried on appeal to this court, and reversed and remanded here, would be to open the pleadings, and to allow the taking of new proof. Whether, upon a subsequent trial, the proofs would be the same, it is impossible for us to foresee. We can not, therefore, determine upon the record before us whether it would promote justice to remand the cause. It would be otherwise, if the errors in the bill, which required amendment, were mere clerical and unimportant. When such errors exist, this court would be able to see clearly that the remanding of the cause was demanded by justice, and might, therefore, remand it for that purpose; but that question not being before us, we do not decide it. We merely except from the operation of this opinion such cases. It would be improper for us to establish a practice of remanding reversed chancery causes, where the record before us enables us to render the decree which the court below ought to have rendered, unless we are able to perceive clearly that such a course is demanded by justice. All the decisions in this State are against such a course.—Code, 540, § 3034; Crabb's Adm'r v. Thomas, 25 Ala. 212; Biddle v. Larkins, 21 *ib.* —; Evans v. Bolling, 5 *ib.* 550; Flake & Freeman v. Day & Co., 22 *ib.* 132.

It is just to the learned chancellor who decided this case, to say, that the point upon which it is reversed was not called to his attention, and is not considered in his opinion.

The cause must be reversed, and a decree here rendered dismissing the bill, without prejudice to any other suit for the same cause of action; and the costs of this court, and of the court below, must be equally divided.—David v. David, 27 Ala. 222; Williams v. Sturdevant, *ib.* 598; Randolph v. Roper, 7 Porter, 249; Grey v. Grey, 15 Ala. 779.

PATTON vs. HAMNER.

[DETINUE FOR A SLAVE.]

1. *Plea of title before suit brought defective.*—In detinue for a slave, a plea which only shows that the title was in the defendant on a specified day before the commencement of the action, is bad on demurrer.
2. *Demurrer visited on first defective pleading.*—Where there is a defective replication to a defective plea, a demurrer to the replication should be visited on the plea.
3. *Sheriff's duty in levying fi. fa.*—The sheriff is bound to pursue the mandate of an execution, unless otherwise instructed by the plaintiff, his attorney, or some one having an interest admitted by the plaintiff; and is not bound to determine the conflicting rights and interests which arise under an agreement, between the plaintiff in execution, under a former levy, and a statutory claimant, to the effect that a judgment of condemnation should be rendered for the agreed value of the property, and that the claimant, on paying this agreed value, should have the property: such an agreement does not, as against the sheriff, render void an *alias fi. fa.*

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. C. W. RAPIER.

DETINUE, by Louisa Patton, against George M. Hamner, for a slave named Sarah. The defendant pleaded, 1st, *non detinet*; and, 2d, a special plea which was, in substance, as follows: That on the 5th March, 1850, one Benjamin Patton, who had been and then was the guardian of the personal property belonging to Josiah J. Stewart and William C. Stewart, two minors, made a final settlement of his guardianship before the probate court of Wilcox, and two judgments were then rendered against him by said court, in favor of his said wards; that executions were duly issued on these two judgments, and were placed in the hands of George M. Hamner, who was then the sheriff of said county; that said Hamner, on the 12th September, 1851, while said executions were still of force, levied them on the slave now in controversy, as the property of said Benjamin Patton; that Louisa Patton, the plaintiff in this suit, interposed a claim to the said slave under the statute in such case made and provided, and a trial of the right of property was afterwards had at the Spring term, 1851, of the circuit court of Wilcox, when, by the con-

sideration of said court, a judgment was rendered in each case, subjecting said slave to said executions; that afterwards, on the 9th August and 9th September, 1851, *alias* executions were issued on said judgments, and placed in the hands of said sheriff, who, on the 12th September, 1851, again levied them on said slave, and on the 6th October following, while said executions were still of force, after having duly advertised the sale, sold said slave, before the court-house door of the county, to the highest bidder; that Calvin C. Sellers became the purchaser at said sale, at the price of \$600, and on the 7th October, 1851, sold and delivered said slave to defendant; of all which plaintiff then and there had notice.

To this plea the plaintiff replied as follows:

"1. *Precludi non*, because she says, that she admits every thing in said plea to be true, except that there was a trial of the right of property by a jury, as set out in said plea, and a condemnation of the slave sued for by a jury; and plaintiff avers, that said judgment entries of condemnation were made without the interposition of a jury, and on the following agreement with said plaintiffs in execution, with the consent of said defendant in execution—viz., that the slave sued for in this action should be valued at \$350, other slaves being levied on under said executions supposed to be sufficient to satisfy the same; that a judgment of condemnation should go; and that the claimant, who is the plaintiff in this action, upon the payment of said agreed value within a reasonable time thereafter, with interest and costs of claim and condemnation, should have said slaves as her own property. And plaintiff further avers, that within a reasonable time thereafter, to-wit, on or about the 20th September, 1851, she tendered said agreed sum, with interest thereon and the costs aforesaid up to the time of said tender, to the defendant, George M. Hamner, who then and there held said slave as sheriff of said county, and who then and there had notice of said agreement, and who then and there refused to receive said money, or to deliver said slave to her or her agent, but held and sold said slave under said executions; and this the plaintiff is ready to verify.

"2. And for further replication to said second plea, by consent of the defendant, said plaintiff says, *precludi non*,

because she says, that said judgment entries of condemnation were then, and now are, wholly void in law, for fraud of said plaintiffs in execution, because they were procured under the agreement set out in the foregoing replication, with the consent of said defendant in execution, with an intention on their part, at the time of procuring it, unknown to this plaintiff, to violate and disregard the same; and that the sale under said executions is equally void with said judgments of condemnation; and this the plaintiff is ready to verify.

"3. And for further replication," &c., "*precludi non*, because she says, that under the said agreement set out in the first foregoing replication, within the reasonable time aforesaid, she tendered to the said defendant, who was then the sheriff of said county, and then and there having notice of said agreement and consent of said defendant in execution, and holding said slave under said executions, the agreed amount of the said judgments of condemnation, with the costs aforesaid, and interest up to the time of tender, which said defendant refused to accept or receive; and that thereby the said contract and agreement became and was then and there wholly rescinded, and said entries of condemnation *precluded?* and the title to said slave vested in said plaintiff; and this she is ready to verify.

"4 And for further replication," &c., "*precludi non*, because she says, that after the judgment entries of condemnation aforesaid, and while the said Hamner, as sheriff, held said slave under said execution, she tendered to him the agreed value of said slave, to-wit, the sum of \$350, with interest thereon up to the time of said tender, and the costs of the said claim and condemnation, which moneys the said defendant refused to receive, but held and sold said slave under said executions, as shown in said second plea; and plaintiff avers, that the said defendant, at the time of said tender, and before said sale, had notice of said judgments of condemnation, and the said agreed value of said slave; and this she is ready to verify."

The defendant demurred, in short by consent, to each one of these replications, and the court sustained his demurrer; and the judgment on the demurrer is now assigned as error.

GEO. W. GAYLE, for the appellant, contended,—

1. That a special, or qualified property, is sufficient to maintain detinue.—*Stoker v. Yerby*, 11 Ala. 322; *Miller v. Eatman*, *ib.* 609; *Dozier v. Joyce*, 8 Porter, 303.

2. That detinue can be maintained upon the facts set out in the first replication.—*Pharr & Beck v. Bachelor*, 3 Ala. 237; *Sadler v. Robinson*, 2 Stew. 520.

3. That the second replication, averring that the judgment was fraudulent, was good.—*Crawford v. Simonton's Executors*, 7 Porter, 110. The judgment being fraudulently obtained, the title to the slave remained in the appellant, and authorized the action.

4. That the claimant, on judgment of condemnation, has the right to pay the judgment, and hold his property; and the tender and refusal of the amount of the agreed judgment, rescinded the contract, and authorized a recovery in detinue. *Wallis v. Rhea & Ross*, 10 Ala. 451.

GEO. W. STONE, contra, made the following points:

1. The first replication of tender was bad, because it did not bring the money into court, and tender it to defendant.

2. The third replication is bad for the same reason, and because the alleged refusal to accept the money could not operate a rescission.

3. The fourth replication is bad, because there is no averment that Hamner knew of the agreement, and because the money is not brought into court.—*Emmons v. Myers*, 7 How. Miss. 375; *Sheriden v. Smith*, 2 Hill's (N. Y.) R. 538; *Brooklyn Bank v. DeGrauw*, 23 Wend. 342; *Lanier v. Trigg*, 6 Sm. & Mar. 641.

4. The second replication sets up no such state of facts as constitutes a fraud in obtaining the judgment. To produce such result, there must be fraud, *i. e.* a false statement of facts, in entering up the judgment; either *suggestio falsi*, or *suppressio veri*. The replication avers only a premeditated breach of promise.

RICE, C. J.—A verdict and judgment rendered in the spring of 1851, against the claimant of a slave, on the trial of the right of property, do not constitute a bar to a title to

the slave *subsequently acquired* by the claimant.—McKissick v. McKissick, 6 Humph. Rep. 75.

Where an action of detinue for a slave was commenced in August, 1852, and a declaration was filed in the usual form, a plea thereto is bad, if it shows no more than that title to the slave was in the defendant on a specified day *before* the commencement of the action—to-wit, on the 7th day of October, 1851.—Wittick v. Traun, 25 Ala. Rep. 317.

The principles above announced, impel us to the conclusion, that the special plea in this case is bad. It can, however, be made good by an additional averment, to the effect that the appellant has not, since the interposition of her claim under the statute mentioned in the plea, acquired any title to the slave.

As the plea in its present shape is bad, it was erroneous to sustain the demurrers to the several replications to it, although each of these replications was in itself bad. The demurrers to the replications should have been visited back on the plea.

If the plea should be amended, according to the intimation above given, it cannot be answered, or avoided, by any of the replications set forth in this record. Admitting the truth of *every fact* stated in any of them, the executions under which the sheriff sold the slave in controversy were not void, and he had authority to make the sale under them.—3 Phil. on Ev. (ed. of 1839) 855; 3 Cranch, 306; 18 Ala. R. 668; 2 Tidd's Practice, 1032. He was not bound to recognize any right asserted by the appellant under the agreement mentioned in the replications. The plaintiff in the execution had the right to control his own process; and the sheriff was bound to pursue the mandate of the process, unless otherwise instructed by the plaintiff therein, or his attorney, or by some one having an interest admitted by the plaintiff. The sheriff certainly was not bound to constitute himself a judge, to determine the questions of conflicting rights and interests which arose out of the agreement mentioned in the replications.—Oswitchee Co. v. Hope, 5 Ala. R. 629; Gary v. Boykin, 7 Ala. R. 154; Crenshaw v. Harrison, 8 Ala. R. 342; Baylor v. Scott, 2 Porter's Rep. 315; Williams v. Charles, 7 Ala. R. 202; Bondurant v. Buford, 1 Ala. Rep. 359; Spence v. Eldridge, 16 Ala. R. 682; Chenault v. Walker, 22 Ala. R. 275; White

& Tudor's L. C. in Eq., vol. 2, pt. 2, top page 109; Ludington v. Beck, 2 Conn. Rep. 706; Jackson v. Caldwell, 1 Cowen, 622.

It is, perhaps, proper to state, that our remarks as to the replications must be confined to the matters which appear in them at present. We cannot know what alterations may hereafter be made in them; and of course, we remain wholly uncommitted as to any such alterations.

For the error of the court below, above mentioned, its judgment is reversed, and the cause remanded.

WILSON vs. SHEPPARD.

[TROVER BY WIFE FOR CONVERSION OF HER SEPARATE CHATTELS.]

1. *Husband incompetent witness for wife.*—The rule which renders husband and wife, unless in a few excepted cases, incompetent to testify for or against each other, has its foundation not only in the identity of their legal rights, but in a wise public policy; and there is nothing in any of the statutes of this State, securing to married women their separate estates; which requires that an exception should be made of cases in which the husband is called upon to testify to his acts in the capacity of trustee for his wife.
2. *Wife's right to property purchased by husband with her separate funds.*—If the husband purchases property with money belonging to his wife's separate estate, other than the income or profits thereof, and takes the title in his own name, the law will compel him, at the instance of his wife, to convey the property to her; and therefore, if he voluntarily conveys it to her, though for the purpose of preventing his creditors from taking it in payment of his debts, his conveyance will be sustained.

APPEAL from the Circuit Court of Chambers.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought, in August, 1853, by Mrs. Harriet E. Wilson, the appellant, who is the wife of Samuel W. Wilson, to recover damages for the defendant's conversion of several buggies and other articles of personal property, which the plaintiff claimed as part of her separate estate. Under the rulings of the court on the trial, the plaintiff was

compelled to take a non-suit with a bill of exceptions, which states that she offered the following proof :

"1. Evidence tending to show that the defendant purchased the property sued for, on the 8th September, 1852, at a constable's sale under process in favor of one Norris and against Samuel W. Wilson, plaintiff's husband, and took the same into his possession, and has ever since continued to use the same as his property; and the value of the property. 2. In order to show title to this property in herself, she read in evidence a certified copy of the last will and testament of Nancy Sale," which was admitted to probate, in Madison county, on the 27th August, 1849, and by which said testatrix made her five nieces, one of whom was Mrs. Harriet Wilson, her residuary legatees. "3. Plaintiff then offered evidence, tending to show that, in December, 1849, her said husband went to North Alabama, and got from the executor of said will \$500 of the money coming under it to her, and receipted for it in her name, and as her agent; that on the 10th March, 1850, she sent her brother-in-law to get the remainder for her, which he obtained in March, 1850, receipted for it in her name, and as her agent, brought the money (about \$1,252 65) to Rockford, where plaintiff then lived with her husband and children, and gave it over into her own possession in American gold. 4. Plaintiff then proved, that her said husband, when they moved to Rockford with their children, in 1849, had no visible property of any kind, except a little household furniture, not more than the law would allow him, and a wagon and four horses, which had but one eye among them, and which had been purchased by him on a credit a short time before, and were sold not long after to pay the debt contracted in purchasing them; that he was a man of intemperate habits, and had at times gambled, and had the reputation of one who gamed; that he had failed, many years before, in business as a merchant, and owed a large number of debts from that cause when the money was received by her under said will.

"The plaintiff then proved facts tending to show, that her said husband got a portion of the gold coin which she had received as aforesaid from her brother-in-law, viz., about \$500, in the spring of 1851, and went to New Orleans, and

bought some flour, bacon, candles, &c., and took them to West Point on the eastern boundary of this State, and commenced selling them out; that he also bought of one Norris a half interest in a livery-stable in Chambers county, which included the property now sued for, some time in June or July, 1851, paid about \$250 on account of it, and took his bond to make title to him when the purchase money (\$1,000) was paid; that when he made this purchase, his wife was not present; that he did not say that he was making said purchase with his wife's means, or as agent or trustee for her, but made the trade in his own name, and took the bond in his own name. The proof further tended to show, that plaintiff's husband, in making this purchase, used the said means received by his wife from the estate of Nancy Sale; that about the 6th July, 1851, after said purchase, he went to said Norris, and told him that he was deeply in debt, that he owed thousands about Wetumpka, that these debts were about to come on him, that one had been already sent over, that he had concealed this from him when he made said purchase, that he now wished him to help him (Wilson) to fix the property so that his creditors could not get at it, and for that purpose wanted him to take back the old papers, and to give him a bond for title as trustee for his wife, in order to keep off his creditors; that said Norris agreed to do this, and the old papers were then canceled, and the new bond given as proposed on the 6th July, 1851; that said Wilson, at the same time, gave notes for the balance of the purchase money, signed 'Harriet E. Wilson, by her trustee, S. W. Wilson.' The proof further tended to show, that said Wilson did not state that the moneys used by him in the purchase were his wife's separate estate, or that he was acting for her as agent or trustee in making the purchase at first; but on this point the proof was conflicting,—tending also to show that he did make these disclosures. The proof tended to show, also, that after this arrangement of 6th July, and some time in the spring of 1852, and after about \$500 had been paid for the property out of the plaintiff's moneys, the property was levied on, and sold, for the debts of said Samuel W. Wilson, and was bought by the defendant in this action. At the time of the levy and sale, the property was in the

actual use of said S. W. Wilson, and of the person who owned the other half interest in it; the family of Wilson subsisting on the proceeds of plaintiff's half.

"The plaintiff then offered her said husband as a witness, to prove that he had no means, except what money he got from her as aforesaid, at the time he made the said purchase of groceries in New Orleans, and at the time he purchased the half interest in said livery-stable; that he had used her means in making these purchases, and that all he had paid was hers; that he did not know, at the time he made said trade in his own name, how to fix the papers; and that he had the alteration made in the bond and notes, under the advice of counsel whom he consulted on the subject. The court, on objection by defendant, refused to let said Wilson prove these, or any other facts, separately or collectively, on the ground that he was an incompetent witness for his wife; and to this ruling plaintiff excepted.

"On the evidence here set out, the court then charged the jury, that if said Wilson made the purchase of the property now sued for, in the first instance, in his own name, and afterwards had the papers changed as shown, so as to make him trustee for his wife, for the purpose of preventing his creditors from taking it in payment of his debts, then the plaintiff could not recover in this action, although they might be satisfied from the evidence that the moneys used in paying for the property were the separate property of the plaintiff; and to this charge the plaintiff excepted."

The charge given, and the refusal to allow Wilson to be examined as a witness, are now assigned as error.

L. E. PARSONS, for the appellant, contended,—

1. That the appellant's husband was a competent witness to testify to the facts proposed to be proved by him. It is admitted that, except in certain cases, husband and wife could not, at common law, testify for or against each other; but this case depends upon the construction to be placed upon several provisions of the Code. So far as his individual interest was involved, he was clearly competent; the property having been sold under execution against him, for his own debts. The Code (§ 2302) provides, that no objection must be allowed

to the competency of a witness, "because he is interested in the event of the suit, or liable for costs, unless the verdict and judgment would be evidence for him in another suit;" and there is certainly no ground for saying that the record could be offered as evidence for or against him in another suit. In answer to the objection that the incompetency is founded on public policy, it is urged that the provisions of the Code, unless the law itself must yield to policy, materially change the policy of our law. The policy of the common law was founded on the idea, now obsolete, that husband and wife, so far as interest was concerned, constituted but one person; that there was unity of thought and feeling, of purpose and action; and that there was one purse in common, which the husband, as the governing head of the family, should use and control. But all this, in many important particulars, is now changed. The wife now has a separate estate, and consequently a separate interest. In relation to her separate estate, of which the husband is by law made the trustee, he occupies the position of an agent who has the right to manage the property of his principal, and to receive the profits as compensation for his services. In respect to matters connected with his agency, he should be allowed to testify, on the same principle which renders any agent a competent witness for his principal; that is, from the very necessity of the case. The facts to which he was here offered, were within his personal knowledge, and could only be certainly known to him. To refuse to allow him to testify, in such case, will place the wife's estate at the mercy of the husband's creditors, and, in a great measure, defeat the protection which the law intended to throw around it.

2. The charge of the court cannot be sustained. It makes the wife's property liable to the husband's debts, because he voluntarily did the very thing which good faith, as well as the express letter of the law, required at his hands, and which a court of equity would have compelled him to do.

WALKER, J.—The incompetency of husband and wife to testify for or against each other, unless in a few excepted instances, has its foundation not merely in the identity of their legal rights, but in a wise public policy. No abandon-

ment, or intention to abandon that policy, is indicated by the statutes securing to married women their property separately from their husbands. There is nothing in those statutes from which we can infer a legislative purpose to mar the sacred confidence of married life, and to open the door for broils and dissension, by permitting husband and wife to testify for or against each other. That the rule which renders the husband and wife incompetent witnesses for or against each other is abolished, cannot result from the severing of their pecuniary interests to a certain extent, because the rule was not founded merely upon the identity of those interests.

In 2 Bright on Husband and Wife, page 42, it is said; that the wife is a competent witness in a suit to which the husband is a party, "when, from the nature of the inquiry, the nature of the information to be expected is *peculiarly* within the knowledge of the wife, and when to exclude such evidence would occasion insecurity to that relation in society, which it is the object of the rule to protect." Under this rule, the competency of the wife to testify against one charged with her forcible abduction and marriage, or against her husband for injuries to her person, and in the like cases, is admitted; but it is susceptible of no construction favorable to the competency of the husband to testify for the wife in such a case as this.

In some cases, an agent is a competent witness, notwithstanding his interest in the event of the suit, from the necessity of the case.—Bean v. Pearsall, 12 Ala. 592. But this exception to the general rule "should never be allowed, in a cause which involves the fraud, negligence, or tortious act of the agent."—Griggs v. Woodruff, 14 Ala. 13. In this case, the question, whether the husband has made a fraudulent transfer to his wife, is involved; and therefore, conceding that there is an analogy between the objection to competency for interest, and for the marriage relation existing between the witness and the party, the husband would not be a competent witness in this case. We prefer, however, to place our decision upon the ground, that the husband and wife are incompetent to testify for or against each other upon principles of public policy; and that incompetency applies, where the husband is called upon to testify as to his acts in the capa-

city of trustee for his wife. The law has never made any exception to the general incompetency of the husband to testify for the wife, because the subject of the testimony was his acts as trustee; and we do not think there is anything in our laws which demands the creation of a new rule. We decide, in this case, that the husband was incompetent to testify as a witness.

If the husband, holding the funds of his wife, not consisting of the income or profits of the wife's separate estate, should purchase property with those funds, and take the title in his own name, the law would compel him, at the instance of the wife, to convey the property to her. If he should make such a conveyance voluntarily, even though it was done for the purpose of keeping his creditors from taking the property in payment of his debts, his conveyance will be sustained, because he must be regarded as having well done that which the law would have compelled him to do.—*Elliott and others v. Horn*, 10 Ala. 348.

The charge of the court was inconsistent with the law thus laid down; and for that reason, the cause is reversed and remanded.

WALDRON, ISLEY & CO. vs. SIMMONS ET AL.

[BILL IN EQUITY BY CREDITOR OF INSOLVENT PARTNERSHIP AGAINST ADMINISTRATOR OF DECEASED PARTNER.]

1. *Jurisdiction of equity to enforce payment of partnership debt out of estate of deceased partner.*—A court of equity had original jurisdiction to enforce the payment of a partnership debt out of the estate of a deceased partner, and that jurisdiction is not taken away by any provision of the Code of Alabama.
2. *Original and concurrent jurisdiction of equity.*—The original jurisdiction of equity is not affected by legislative enactments, conferring jurisdiction on the courts of law, unless the statute contains prohibitory or restrictive words; but such enactments are held to confer concurrent remedies.
3. *Section 2142 of Code, in reference to suits against partners, construed.*—Section 2142 of the Code, which provides that one partner, or his legal representa-

tives, "may be sued for the obligation of all," provides a plain and adequate remedy at law to enforce the payment of a partnership debt out of the estate of a deceased partner, but does not take away the original jurisdiction of equity in such cases.

4. *Section 602, defining jurisdiction of chancery courts, construed.*—Under section 602 of the Code, which defines the powers and jurisdiction of the chancery courts in this State, the first subdivision, which includes "all civil causes in which a plain and adequate remedy is not provided in the other judicial tribunals," is but the adoption of the pre-existing rule; the second and third subdivisions, which include cases founded on a gaming consideration, and cases to subject the equitable title to real estate to the payment of debts, are modifications, by way of enlargement, of the system of equity jurisprudence and jurisdiction which had been established in England prior to the American revolution; and the fourth subdivision, which includes "such other cases as may be provided for by law," embraces all cases which, at and before the adoption of the Code, were known to be within the jurisdiction of courts of equity, and are not embraced in the first three subdivisions.

APPEAL from the Chancery Court of Pike.

Heard before the Hon. WADE KEYES.

THIS bill was filed by the appellants, in October, 1854, to enforce the payment of a debt, due to them by the late firm of Simmons, Stewart & Co., out of the estate of Austin A. Stewart, a deceased partner, and alleged that the said firm and its surviving partners were insolvent. The chancellor dismissed the bill, for want of equity,—holding that the complainants had a plain and adequate remedy at law, under section 2142 of the Code, and had, therefore, under section 602, no right to come into equity; and his decree is now assigned as error.

NAT. HARRIS, for the appellant.

Independent of any statutory provisions, the only remedy of a partnership creditor, against the estate of a deceased partner, was in equity.—Collyer on Partnership, § 580, note 3. Before the adoption of the Code, he could not proceed against the separate estate of the deceased partner, at law, without making affidavit that the surviving partner was insolvent, unable to pay the amount of the debt, or resident beyond the jurisdiction of the court.—Clay's Digest, 324, § 67. Neither this, nor any similar provision, has been incorporated into the Code; and it follows, therefore, that an

action at law, in such case, cannot be sustained. Section 2142, which was supposed by the chancellor to authorize an action at law, was the law, in substance, before the adoption of the Code, and before the passage of the act of 1839, above cited; yet the act of 1818 (Clay's Digest, 323, § 61) was never held to authorize an action at law against the administrator of the deceased partner, and for that reason the act of 1839 was passed. The right to resort to equity, therefore, still continues, unless clearly taken away by some other provision of the Code. Section 602 is simply declaratory of the rule which existed before the adoption of the Code, and does not limit or restrict the jurisdiction of equity. A statutory grant of jurisdiction to the courts of law, over matters which were within the original jurisdiction of equity, has always been held to confer only concurrent remedies. If, therefore, section 2142 gives an action at law, still the remedy in equity is concurrent.

MARTIN, BALDWIN & SAYRE, *contra*, submitted the case without brief or argument.

RICE, C. J.—It is clear that, originally, a court of equity had jurisdiction in any such case as that made by the bill; and that a plain and adequate remedy, in every such case, was provided in the courts of law, by section 2142 of the Code. The simple question, therefore, is, whether the jurisdiction originally exercised in such a case by a court of equity, is annihilated by section 602 of the Code.

The words of that section are as follow: "The powers and jurisdiction of courts of chancery extend: 1. To all civil causes in which a plain and adequate remedy is not provided in the other judicial tribunals. 2. To all cases founded on a gambling consideration, so far as to sustain a bill of discovery and grant relief. 3. To subject the equitable title or claim to real estate to the payment of debts. 4. To such other cases as may be provided for by law."

It is incontrovertibly established by the authorities, that if a court of equity originally had jurisdiction in any class of cases, such jurisdiction is not overturned by subsequent legislative enactments, which confer on courts of law the

same remedial faculty which belonged to the court of equity, but do not contain prohibitory or restrictive words; and that where no such words are used, "the uniform interpretation is, that such legislative enactments confer concurrent, and not exclusive remedial authority."—1 Story's Eq. Jur. §§ 80, 64 *i.*; Harrison v. Rowan, 4 Wash. C. C. R. 205; Pratt v. Northam, 5 Mason's R. 105; Cox v. Strode, 2 Bibb, 273; Cooper's Pl. 142; Wright v. Hunter, 5 Vesey, 792; Shepherd v. Monroe, 2 No. Car. Law Rep. 624; Crawford v. Childress, 1 Ala. R. 486; Couch v. Terry, 12 Ala. R. 225; Dement v. Boggess, 13 Ala. Rep. 140; Pharis v. Leachman, 26 Ala. R. 662; Boyce v. Grundy, 3 Peters, 215; Woodman v. Freeman, 25 Maine R. 541.

Section 2142 of the Code merely provides a plain and adequate remedy at law in any such a case as that made by the bill. No negative, prohibitory, or restrictive words are used in it, nor in section 602. In the face of the declaration contained in section 602, that "the powers and jurisdiction of courts of chancery *extend to*" four specified classes of cases, indicated by the four subdivisions of that section, we cannot say that the legislature have by that section taken away their powers and jurisdiction, in all cases which do not fall within the *three* classes indicated by the first three subdivisions. We are bound to give some meaning and force to the *fourth* subdivision, as it clearly admits of it; and the meaning we ascribe to it is, that it affirms and declares the jurisdiction of courts of chancery in all cases which are not embraced in the first three subdivisions, but which, at and before the adoption of the Code, were known to be within the jurisdiction of such courts, and which are therefore described as "such *other* cases as may be provided for by law."

The words "*other* cases," as there used, mean cases *other* than the cases included in the first three subdivisions. The words "as may be provided for by law," as there used, cannot, upon any rule of construction known to us, be converted into the following words, "as may be provided for by *this* Code, or by any statute *hereafter* passed;" but evidently refer to the law which was of force *when the Code was adopted, and which was not repealed by the Code*. To hold that the fourth subdivision means simply to declare that the powers and

jurisdiction of courts of chancery "extend to such other cases as may be provided for" by some section of the Code, or by some subsequent statute, is to deprive it of all meaning, and practically to expunge it; for it is clear that the powers and jurisdiction of courts of chancery would extend to all cases provided for by the various sections of the Code and by subsequent statutes, as effectually without the fourth subdivision of section 602, as with it.

At the adoption of the Code, that system of equity jurisprudence and jurisdiction which, prior to the American revolution, had been built upon wide and rational foundations in England, was part of our system for the administration of justice, except so far as it had been affected by our statutes of "a public nature designed to operate on all the people of the State." Every such statute which was "not embraced" in the Code, was expressly repealed by its 10th section. But no part of the Code repeals that system of equity jurisprudence and jurisdiction, which, it is conceded on all hands, formed part of our system when the Code was adopted. We think there was a *design* in thus repealing these statutes of a public nature which were not embraced in the Code, and in omitting to repeal the known system of equity jurisprudence and jurisdiction.

Our conclusion is, that the first subdivision of section 602 is but the adoption of an existing rule; that the second and third subdivisions are modifications, by way of enlargement, of the system of chancery jurisprudence and jurisdiction which had been established in England before the American revolution; and that the fourth subdivision was an adoption of that system, as modified by the second and third subdivisions, and by other sections of the Code. And we are entirely satisfied that, as to cases in which originally jurisdiction had vested legitimately in courts of chancery, the jurisdiction is not abolished by anything contained in section 602, although a plain and adequate remedy at law in such cases is provided by some other section of the Code,—no prohibitory or restrictive words being used. See authorities cited above.

It results from what we have said, that the chancellor erred in dismissing the bill. His decree is, therefore, reversed, and the cause is remanded.

ASKEW ET AL. vs. HOOPER, ADM'R, &C., ET AL.

[BILL IN EQUITY FOR RESCISSION OF CONTRACT ON GROUND OF FRAUD.]

1. *Statute of limitations, how applied in equity.*—The statute of limitations applicable to actions at law is not binding on the chancery court, in cases of exclusively equitable cognizance; but that court, besides refusing to interfere where there has been gross laches, or a long or unreasonable acquiescence in the assertion of adverse claims, often adopts, in cases to which the statute of limitations does not strictly apply, a period within which its aid must be sought, similar to that prescribed in analogous cases at law.
2. *Laches fatal to relief.*—A bill for the rescission of a contract of purchase, on the ground of the vendor's false representations, was filed thirteen or fourteen years after the discovery of the fraud, and, although it alleged that the complainant abandoned the land on the discovery of the fraud, showed no act on his part which would have precluded him from enforcing the specific execution of the contract, if a favorable fluctuation in the price of the land had made it his interest to do so; and the laches was held fatal to the relief, on demurrer for want of equity.
3. *Legal defence to note no ground of equitable jurisdiction.*—Where a note, given for the purchase money of town lots, at a place which was the contemplated terminus of a railroad then in process of construction, was made payable "when the first locomotive engine on the M. railroad should arrive" at the town, the fact that the railroad company was sold out, and the road completed by another company subsequently incorporated, is available (if at all) as a defense at law, and therefore constitutes no ground for a resort to equity.

APPEAL from the Chancery Court of Russell.

Heard before the Hon. JAMES B. CLARK.

L. E. PARSONS and JOHN A. LEWIS, for appellant.

HOOPER & DUNCAN, BELSER and SEMPLE, *contra*.

WALKER, J.—The decree of the chancellor, dismissing the bill filed by appellants, for want of equity, is assigned as error. The appellants purchased on 12th December, 1837, two lots in West Point, which purchase is evidenced by a bond for titles. For the purchase money they executed three notes, one of which was payable "when the first locomotive engine should arrive at West Point in Georgia, on the Montgomery railroad from Montgomery." One of the three notes has been paid, another has been paid in part, and the last named of the three notes is sued upon. The bill seeks to rescind the con-

tract for the purchase of the lots, and to enjoin the collection of the notes, and contains a prayer for other specific relief, which it is not necessary to notice. The rescission of the contract is claimed upon the ground, that the purchaser was induced by representations that the railroad from Montgomery to West Point would be completed in two or three years, which representations were not known to be true. The representations made were credited, and acted on, because some of the vendors, who made them, were stockholders, and some directors, in the railroad company. The complainants erected a warehouse on one of the lots. The bill was filed on the 28th March, 1854.

From this partial statement of the allegations of the bill, it will be perceived that there was a period of more than sixteen years, between the making of the contract of purchase and the commencement of this suit, and of at least thirteen or fourteen years between the time when (it was asserted) the railroad would be completed to West Point and the commencement of this suit. As this is a case of exclusively equitable jurisdiction, the statute of limitations, applicable to suits at law, was not binding on the chancery court in its decision. But courts of equity often refuse to grant relief, in cases to which the statute of limitations does not strictly apply, and adopt a period, in which their aid must be sought, similar to that prescribed in analogous suits at law. Besides, courts of chancery refuse to interfere, in many cases, "where there has been gross laches in prosecuting rights, or a long or unreasonable acquiescence in the assertion of adverse claims." "Nothing can call forth (the chancery) court into activity, but conscience, good faith, and reasonable diligence."—*Gunn v. Brantley*, 21 Ala. 644; *Johnson v. Johnson*, 5 Ala. 94; *Kern v. Bonham*, opinion at this term, by C. J. Goldthwaite; 2 Story's Equity Jurisprudence; 1520, notes; *Pintard v. Martin*, 1 Sm. & Mar. Ch. R. 134.

If the equity claimed in the bill is assimilated to a suit for the recovery back of money paid; or for an action to recover damages for a deceit, or even an action for the recovery of land, the chancery court could grant no relief, because the period which elapsed, after the cause of action accrued, before suit brought, exceeds the period of limitation applica-

ble to either one of those actions. However, if it be conceded to the appellant, that the court of chancery cannot in this case adopt from analogy the period prescribed in the statute of limitations, the laches of the complainants, and their acquiescence for so long a time, must be fatal to the bill. In determining whether the complainants' case is vitiated by their laches, we have no fixed rule to guide us, but must look to the circumstances.

The representations of complainants' vendors were to the effect, that the railroad would be completed to West Point in two or three years. The term limited in those representations for the completion of the road, expired in 1839 or 1840. The complainants must have then ascertained with certainty, that the representations were not true. Why did they postpone the suit from that time until 1854? It is alleged in the bill, that one of the complainants was never in *actual* possession of the lots, and that the other complainant has not been in *actual* possession since 1839 or 1840; that neither of them has exercised any act of ownership since 1840; and that "the said lots have been wholly abandoned by" both the complainants. At what time the entire abandonment took place does not appear; nor is it alleged in the bill that the complainants ever notified the vendors of their abandonment; or that the vendors knew of the abandonment; or that the bond for title was ever tendered to the obligors; or that an offer to rescind had ever been made. The complainants do not show that they had done any act, or spoken any word, up to the time when the suit was commenced, which would preclude them from claiming the land. They were, therefore, in a condition, at the commencement of this suit, to have coerced a specific performance of their purchase, if a favorable fluctuation in the price of real estate had made it their interest to do so. It would involve the grossest injustice, to permit purchasers to remain silent for so long a period of time, knowing all the facts upon which their right of suit depended, and with no obstacle in the way of the suit; and at the end of that time, confirm or rescind their purchase, as the rise or fall in the price of property might make it their interest to do. It would be equivalent to permitting them to cling to

Shaw v. White, executor, &c.

the speculative advantages of a contract, and then to abandon it because the speculation was not realized.

The question is evidently designed to be raised, whether the event has happened upon which the note in suit was payable. Even though the makers of the note may be absolved from the payment of the note, because the Montgomery railroad was sold out, and a company subsequently incorporated was the instrument of completing the road and running a locomotive engine from West Point to Montgomery, that is a matter which is available as a defence to the note at law, and cannot support the jurisdiction of this court.

The decree of the chancery court is affirmed, at the costs of the appellants.

SHAW vs. WHITE, EXECUTOR, &C.

[ACTION BY MARRIED WOMAN ON PROMISSORY NOTE, EXECUTED TO HER WHILE SOLE, AND CLAIMED AS PART OF HER SEPARATE ESTATE.]

1. *Demurrer to evidence, object and effect of.*—The object of a demurrer to evidence is not to substitute the judge for the jury as a trier of the facts, but to ascertain the law upon an admitted state of facts; and its effect, when issue is joined, is to admit every fact which the testimony establishes, or tends to establish: the court does not stand in the place of a jury, to render such a judgment as the jury ought to have rendered, but to render a judgment against the party demurring, if the jury could legally have done so from the evidence.
2. *Gift of money, facts held, on demurrer, not sufficient to show.*—In an action to recover money loaned, plaintiff proved that her grand-father, with whom she was then living, loaned the money to defendant, and took his note payable to her; that he stated, at the time, that the money was his, but that he intended it for plaintiff, at his death, if she remained with him until that time, and pleased him; that she afterwards married, and left her grand-father's house; and that he subsequently went to defendant, gave him up the note, (which defendant then destroyed,) and took another note payable to himself: *Held*, on demurrer to this evidence, that it showed no right of recovery in plaintiff.
3. *Joinder in demurrer to evidence, when court may require.*—Where the evidence introduced by the plaintiff does not tend to establish his right to recover, and the defendant introduces no evidence, but demurs to the plaintiff's, the court is authorized (Code, § 2349) to require the plaintiff to join in the demurrer.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. JOHN GILL SHORTER.

THIS action was brought, in February, 1855, by Mrs. Apsilla Shaw, the appellant, to recover the amount of a promissory note, alleged to have been executed by the defendant on the 1st January, 1853, when the plaintiff was sole and unmarried, and payable to her, by her maiden name of Apsilla Travathan, on the 1st January, 1854. The complaint alleged that the plaintiff, since the execution of the note, had intermarried with William Shaw, her present husband, and that the note was a part of her separate estate; and contained a count for money loaned by plaintiff to defendant.

The judgment entry recites that the defendant, David Fleming, made affidavit in writing that Wellborn C. White, as executor of John White, deceased, claimed the money in controversy,—deposited the money in court, and prayed that said White, as executor, might be substituted in his stead as defendant; that thereupon said White appeared, made himself a party to the suit, and pleaded “that said Fleming is not indebted to said plaintiff, with leave to give in evidence any matter in bar of the action”; that Fleming was then discharged from all liability, and issue was joined on the plea tendered by said White. The judgment entry then proceeds as follows:

“Thereupon the plaintiff proved, that she intermarried with William Shaw, in Pike county, Alabama, in July, 1854; that she and her said husband had resided in said county for several years before their marriage, and have ever since resided there; that she resided, for several years before her said marriage, with one John White, and was a young lady, the grand-daughter of said White, and kept house for him, and attended to his domestic affairs,—said White being unmarried; that one John Spence, four or five years ago, had applied to said White to borrow money, and that said White said, ‘he had no money, but his grand-daughter, Apsilla, [the present plaintiff,] had some money, but that he [said Spence] should not say anything about it’; that said Spence borrowed \$100, and gave his note for \$100, payable to Apsilla Travathan, or bearer,—which note was paid about six or eight

months after the money was loaned. It was also in evidence that, in 1853, the said David Fleming applied to said White to borrow money; that White loaned him \$200,—stating, at the time, that the money was his, but that he intended it for his grand-daughter, Apsilla Travathan, at his death, if she remained with him until his death, and pleased him, and that he would take the note, payable to her, or bearer; that the note given was a promissory note, in the common form, and was due in January, 1854; that his object, in making the note payable to her, was, that if he died, and she remained with him until his death, she might then control it as her property; that she married the said William Shaw, after the execution of said note, and left the house of the said White, and never resided with him after her marriage; that said White, after plaintiff's said marriage, called on said Fleming, gave him the note which he had previously made, payable to said Apsilla Travathan, and took from him a note payable to himself (said White) for the amount due on said first note; and that said Fleming destroyed the note which he had first made, payable to said Apsilla. The plaintiff also proved that, about one year before the death of said White, which occurred in 1854, another person called on him to borrow money, and that said White stated, that he had no money himself, but that his grand-daughter (the plaintiff) had some which she would loan; and it was also in evidence, that said White was a man of considerable property. This was all the evidence introduced by the plaintiff, and the defendant introduced none; and thereupon the defendant demurred to the said evidence, and the court required the plaintiff to join in the demurrer,—which the plaintiff did."

The court rendered judgment on the demurrer for the defendant, and its judgment is now assigned as error.

GOLDTHWAITE & SEMPLE, for the appellant: If there was any evidence tending to show that the plaintiff was entitled to recover, the judgment on the demurrer should have been for the plaintiff.—*Bryan v. The State*, 26 Ala. 65, and cases there cited.

PUGH & BULLOCK, *contra*: Conceding the rule of law laid

down in Bryan's case, the judgment on the demurrer was correct. Giving the plaintiff the full benefit of all the facts proved, and of every reasonable inference and intendment, no jury could have legally rendered a verdict in her favor. The money loaned belonged to the appellee's testator. He intended, upon certain contingencies, to give it at his death to the plaintiff; but the contingencies never happened. The note which he had taken payable to her, and which had never passed out of his possession, was destroyed, and a new one was taken payable to himself. The evidence showed conclusively that plaintiff had no right to recover; and the court was authorized to require the plaintiff to join in the demurrer.—Brandon v. Huntsville Bank, 1 Stew. 320; Alexander v. Fitzpatrick, 4 Porter, 405.

RICE, C. J.—In Bryan v. The State, 26 Ala. 65, this court held, that the object of a demurrer to evidence is, not to substitute the judge for the jury as a trier of the facts, but to ascertain the law upon an admitted state of facts; and that its effect, when issue is joined, is to admit every fact which the testimony establishes, or tends to establish. It was also held, that upon a demurrer to evidence, the court does not stand in the place of a jury, to render such a judgment as the jury ought to have rendered, but to render one against the defendant, if the jury, from the evidence, could legally have done so.—See, also, Carson v. The Bank, 4 Ala. 148; Foster v. McDonald, 5 *ib.* 376; Alexander v. Fitzpatrick, 4 Porter's R. 405, and authorities therein cited; Gibson v. Hunter, 2 H. Bl. Rep. 206; Norvell v. Camm, 2 Rand. Rep. 68; Whittington v. Christian, 2 *ib.* 353; Jones v. Vanzandt, 2 McLean's R. 596.

Adhering to the law as above laid down, we are satisfied there was no error in the judgment of the court below upon the demurrer to the evidence. No fact or circumstance appears in that evidence which has any legitimate *tendency* to prove that the appellant was entitled to recover; but, on the contrary, the evidence shows that she was not entitled to recover.

In such a case, the court is authorized, by section 2349 of the Code, to compel the plaintiff to join in the demurrer to

the evidence. The precise operation upon that demurrer was, to take from the jury, and to refer to the judge, *the application of the law to the fact*; and the defendant had the right to withdraw from the jury the application of the law to the fact, by interposing a demurrer to the evidence,—the effect of which was to admit upon the record “every fact and every conclusion which the evidence given for the plaintiff conduced to prove.” The defendant may not have the right, by demurring to evidence which is loose, uncertain, contradictory, or circumstantial, but which, nevertheless, *tends to show a right of recovery in the plaintiff, to call upon the court to draw inferences from such evidence, or to determine how far it goes to establish the right of the plaintiff to recover.*—See *Whittington v. Christian, supra*. But, however that may be, it is clear that, where the evidence introduced by the plaintiff does not *tend* to establish his right to recover, the defendant has the right, by a demurrer to it, to call upon the court to pronounce its legal effect; and the court is authorized to compel a joinder in the demurrer.—Code, §§ 2349, 2350. In such a case, the right of the defendant to demur is as clear as his right to demur to the pleading. *Alexander v. Fitzpatrick, supra; Norvell v. Camm, supra*; and other authorities *supra*.

There is no error, and the judgment is affirmed.

IVEY'S ADM'R vs. OWENS AND WIFE.

[ASSUMPT TO RECOVER PROCEEDS OF SALE OF SLAVE, CONVERSION BEING WAIVED.]

1. *Parol gift—Delivery and retention of possession.*—Although an actual delivery is indispensable to perfect a parol gift of a slave, yet it is not necessary that the actual possession should be afterwards retained by the donee: subsequent possession by the donor is not necessarily incompatible with the donee's dominion over the property, nor is it conclusive evidence that there was no delivery, or that the dominion did not pass to the donee.
2. *Donor's subsequent possession explained.*—Although the donor's subsequent possession, when the donee is twenty-one years of age, is not necessarily explained

by the single fact that his home is also the home of the donee; yet where the donee is the daughter of the donor, and lives with him as a member of his family, and the slave is too young to be a source of profit or active service, or to be permanently separated from a family of slaves belonging to the donor,—these facts, *prima facie*, are a sufficient explanation of the donor's subsequent possession and control of the slave, although the donee is over twenty-one years of age.

3. *What constitutes delivery.*—If a parent places the hand of a slave in the hand of his daughter, declaring at the time that he gives the slave to her, and this is done with the intention thereby to create and consummate a parol gift, the dominion over the slave passes to the donee, and the gift is complete.
4. *Charge legally correct and applicable to evidence sustained.*—A party cannot complain of a charge, which, when construed in reference to the evidence, asserts a correct legal proposition: if he desired any explanation of it, he should have asked additional instructions.
5. *Statute of limitations.*—Where a party has the right to bring either trover for the conversion of his slave, or assumpsit for the proceeds of sale, and elects to proceed in the latter action, the statute of limitations begins to run from the time that cause of action accrued; and the fact that the other remedy is barred does not defeat the action.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by Lorenzo D. Owens and Nancy, his wife, against William H. Chambliss, as the administrator of William Ivey, deceased, to recover \$900, the alleged price of a slave named Jinney, who was hired by plaintiffs to said Ivey, and sold by him while in his possession under the contract, on the 1st January, 1853; and the complaint also contained the common counts for money loaned, money had and received, and money paid and expended. The defendant pleaded, 1st, "that he does not owe the money," 2d, "the statute of limitations of three years," and, 3d, "the statute of limitations of six years."

"On the trial," as the bill of exceptions states, "the plaintiffs showed title to the slave Jinney, by virtue of an alleged gift from defendant's testator, who was the father of the plaintiff Nancy, to her. The proof showed that said Nancy, who was then of lawful age and unmarried, lived with her father in 1841, and previous thereto, and continued to live with him until 1846 or '47. The plaintiffs' testimony conduced to show that, in 1841, '42, or '43, the defendant's testator called up his daughter Nancy and the slave Jinney, who

was then a small negro, placed the hand of Jinney in the hand of said Nancy, and stated that he gave the negro to his daughter, to pay her for the long services which she had rendered to him and his family after she had come of age, and called upon the witness to witness that he then delivered the negro to his daughter as her own property. It was in evidence, by the testimony of one of the witnesses, that in all the conversations the witness ever had with the defendant's testator, after the transaction, in relation to the girl, he said that she belonged to his daughter Nancy. It was further in evidence, by the testimony of another witness, that on one occasion, subsequent to 1843, when some one called on defendant's testator, and proposed to purchase said slave, said testator stated, that he could not sell her, because she belonged to his daughter Nancy, and refused to sell her; further, that when Nancy was about leaving for Louisiana; to reside with her brother-in-law, one Aldridge, she called upon her father for the slave; that her father objected to her taking the slave at that time, for the reason that she was too young to be taken off and parted from the family, but stated that, if she would let the negro remain, he would send her the next fall, and that in the meantime, if the slave's services were worth anything, he would pay her hire. It was further in evidence, that defendant's testator afterwards, in 1852, sent money, say \$20 at one time, to his daughter Nancy, in reply to a letter from her; but there was no further evidence, tending to show that this money was sent as payment for hire. The proof further conduced to show, that the slave continued in the possession of the defendant's testator, until February, 1853, when he sold her for \$800.

"On this proof, the court charged the jury, that if the plaintiff Nancy lived with her father, the defendant's testator, and he called up the slave Jinney, and placed her hand in the hand of said Nancy, and made use of the language, 'that he gave the negro to his daughter, to pay her for the long services which she had rendered to him and his family after she had come of age'; and if the jury further find that it was the intention of said testator, by this act and the accompanying declaration, to give the said slave to the said plaintiff,—that this, in law, amounts to a delivery, and transfers the

dominion over the slave to plaintiff, and constitutes a valid parol gift, and passes the title to plaintiff, without further change of possession; to which charge the defendant excepted. The court also charged the jury, in connection with the above, that the subsequent possession of the donor might be explained, by the fact that the home of the donee was also the home of the donor.

"The proof further conduced to show, that plaintiff Nancy, in September, 1847, demanded the said slave of the defendant's testator, who refused to give her up; that he worked and controlled said slave, until January, 1853, when he sold her; that in March, 1853, said testator died, and on the 23d April following letters of administration *ad colligendum* were taken out on his estate by Mrs. Ivey, and on the 13th July following letters of administration were granted to the present defendant. On this evidence, the defendant asked the court to charge the jury, that if they found from the evidence that said testator, in September, 1847, denied to plaintiff her right in said slave, and continued in the possession, direction, and control of the slave, until January, 1853, and then sold her as his own; and that said testator died in March, 1853, and administration was granted on his estate in April following,—then the statute of six years barred this action, and they must find for the defendant. This charge the court refused to give, and charged in lieu thereof, that it was necessary, to create the bar of the statute, that defendant's testator should have held the continuous adverse possession of the property itself, with open claim of title, for six years next preceding the suit; and that, if he held the slave for five years, and then sold her, the statute does not apply. To the refusal to charge as asked, and to the charge given, the defendant excepted.

"Pending the trial, the plaintiff offered to read the deposition of Jesse Ivey, of which the 11th direct interrogatory was as follows: 'Did you ever hear said William Ivey, after said transaction, make any declarations, at any time, going to show that he had given said slave to said Nancy? if so, state what he said, and the different times at which he said it.' The answer of the witness was as follows: 'In all the conversations I had with him, after that transaction, in relation to the

girl, he said that she belonged to his daughter Nancy.' The defendant moved to suppress and exclude this answer, but the court overruled the motion; and the defendant excepted."

The rulings of the court on the evidence, the refusal to give the charges asked, and the charges given, are now assigned as error.

WATTS, JUDGE & JACKSON, for the appellant:

1. To constitute a valid parol gift, *inter vivos*, there must be an actual delivery of the thing intended to be given, and an actual parting with dominion over it.—Sewall v. Glidden, 1 Ala. 52; Sims v. Sims, 2 *ib.* 217; Durett v. Seawall, 2 *ib.* 669; Blakey's Adm'r v. Blakey's Heirs, 9 *ib.* 391; Phillips v. McGrew, 13 *ib.* 255; Hunley v. Hunley, 15 *ib.* 91; Bryant v. Ingraham, 16 *ib.* 117; Jones v. Dyer and Wife, 16 *ib.* 221.

2. The facts proved, upon which the charge asked as to the statute of limitations was predicated, constituted a complete bar. More than six years from the commencement of the adverse possession, allowing six months from the grant of administration, had elapsed before the commencement of the suit; and the fact that the testator did not retain the slave six years before his death, claiming adverse title, makes no difference, if the time which had elapsed at his death, added to the period which intervened between his death and the commencement of the action, completed the six years.—Angell on Limitations, (2d ed.) 446; Alexander v. Pendleton, 8 Cranch, 462; Melvin v. Proprietors on Merrimack River, 5 Metcalf, 15.

3. The answer of the witness ought to have been excluded, because not responsive to the interrogatory.

J. F. CLEMENTS, *contra*:

1. Though delivery of possession is essential to perfect a parol gift of personalty, yet there may be an actual delivery without a change of possession; or, in other words, any act of delivery operates, in law, a change of possession. It is a clear principle of law, as well as of natural justice, that a parent may make a parol gift of property to his daughter, and the fact that she lives with him does not vitiate the gift. To perfect a parol gift, in such case, it is sufficient that it appear

that an actual gift was intended, and that the intention was manifested by some act which may fairly be construed into a delivery. Such intention and act are clearly shown by the facts of this case; and the donor's subsequent retention of possession is sufficiently explained by the facts, that the donee had no other home, and that the slave was too young to be removed. In support of these positions, the following cases are cited: *Davis v. Davis*, 1 Nott & McCord, 225; *Martrick v. Linfield*, 21 Pick. 325; *Steel v. McKnight*, 1 Bay, 64; *Young v. Young*, 3 Miss. 38; *Thomas v. Degraffenreid*, 14 Ala. 681; *Goodwin v. Morgan*, 1 Stew. 278; *Sims v. Sims*, 8 Porter, 449; *Sewall v. Glidden*, 1 Ala. 52.

2. As to the statute of limitations: The action is not trover for the conversion of the slave, but assumpsit to recover the proceeds of sale. The statute had not perfected a bar when the slave was sold, and a new and distinct cause of action accrued by the sale. The plaintiffs had the clear right to waive the tort, and sue for the money; and having thus elected to proceed, the defendant cannot allege his own wrong to defeat the action.—*Angell on Limitations*, 76; *Lamb v. Clark*, 5 Pick. 193; *Ferriss v. Ferriss*, 1 Root; *Miller v. Miller*, 7 Pick. 133; 1 Cond. En. Ch. 297; 13 East, 474; 1 Cowper, 376.

3. The answer was responsive to the interrogatory.

WALKER, J.—Delivery is an indispensable ingredient of a parol gift. When the gift has been perfected, the subject-matter of the gift passes immediately under the dominion of the donee. Hence the inquiry, whether the thing given has passed under the dominion of the donee, is applied as a test of the completion of the gift. There is no delivery without a transfer of the property, from the dominion of the donor, to that of the donee. The subsequent possession of the property by the donor is not necessarily incompatible with the investiture of the donee with the dominion over it. One may have the actual possession, while another may have the dominion which appertains to ownership. While, therefore, there must be an actual delivery to the donee, in order to give dominion over the property, it is not necessary that the actual possession so acquired should afterwards be retained. If a gift has

been consummated by delivery, the mere fact that the donor afterwards exercises actual control of the property will not divest the title transferred by the gift. Nor is the subsequent possession of the donor *conclusive* evidence that there has been no delivery, or that the dominion over the property has not passed to the donee. That circumstance is susceptible of explanation; and the facts, that the donee is the donor's daughter, lives with him, and composes a part of his family, and that the subject of the gift is a slave, too young to be a source of profit or active service, or to be permanently separated from a family of slaves belonging to the donor, would be, *prima facie*, sufficient explanation of the subsequent control and possession of the donor, notwithstanding the donee might be over the age of twenty-one years.—*Hannah v. Sparks*, 4 H. & J. 310; *Degraffenreid v. Thomas*, 14 Ala. 681; *Easley v. Dye*, *ib.* 158; *Young v. Young*, 25 Miss. 38; *Stallings v. Finch*, 25 Ala. 518; *Sewall v. Glidden*, 1 Ala. 52; *Sims v. Sims*, 8 Porter, 449.

If a father place the hand of a slave in the hand of his daughter, and declare that he gives the slave to the daughter; and if the intention exist, by the declaration and accompanying act, to make a gift, consummated in delivery, the dominion over the slave passes to the donee, and the gift is complete. The mere placing of the slave's hand in that of the donee would not, of itself, amount to a delivery; but, if that act is done with the intention to perfect a gift by delivery, it would have such effect. It is impossible to define in advance with particularity what will constitute a delivery. The question, in every case, must depend upon the nature of the property. "It must be "*secundum subjectam materiam*," and the true and effectual way of obtaining the dominion over the subject.—*Smith v. Wiggins*, 3 Stew. 221; *Smith v. Smith*, 2 Strange, 955; *Davis and Wife v. Exr's of Davis*, 1 Nott & McCord, 955.

In this case, the subject-matter of the gift was a slave, the actual dominion and control of which can be appropriately and effectually transferred by placing the hand of the slave in that of the donee, and accompanying that act with words of gift and conveyance, which not only tend to manifest the intention of the act, but inform the slave to whom his future obedience would be due. There are many conceivable in-

stances in which such an act, with such an accompanying declaration, could not constitute a gift, or evidence a delivery. If a parent, in mere playfulness, or from any other than a motive to really transfer the property, were to go through the ceremonial of a gift to his child, no title would pass. An apprehension is expressed in the case of *Reed v. Colcock*, 1 Nott & McCord, that transactions in domestic life, never designed to have effect as transfers of property, may, under the law of parol gifts, be converted into conveyances of title. Such a result cannot ensue, if due weight is given to the requisition, that the intention by the act and accompanying declaration to make a gift must appear. It is the intention, characterizing the act and declaration, which must control their effect.—*Sims v. Sims*, 8 Porter, 449.

The decision in the case of *Sims v. Sims*, 2 Ala. 117, is not in conflict with the principle laid down in this opinion. In that case, there was no act of delivery whatever by the donor. The slave was not under the dominion of the donee for a single instant. There was not even an intermission in the donor's possession. The *locus penitentie* remained to the donor. In the case presented in the charge of the court in this cause, there was what may amount to an actual placing of the property under the dominion of the donee. An act was done, and words were spoken, which, characterized by the appropriate intention, were sufficient to pass the title.

The precise language of one of the charges of the court is, "that the subsequent possession of the donor *might* be explained, by the fact that the home of the donor was also the home of the donee." We are not willing to decide that the subsequent possession of the donor would necessarily be explained by the mere *fact* that the donor and donee had the same home, where the donee is over the age of twenty-one years. We do not understand the charge to assert such a proposition. The language of the charge is, that the possession of the donor "*might be*," not that it would be, explained by that fact. The effect of the charge is, that the particular circumstance *may*, or *may not*, have been explained by that fact, according to the other circumstances in the case. This charge was permissible, when construed in reference to the testimony, that the donee was an unmarried daughter, had

long been engaged in rendering services for the donor and his family, and lived in his family, and that the negro was too young for active or profitable service, or to be separated from the family to which she belonged. The charge asserts a correct proposition of law; and if the defendant desired any explanation of it, he should have asked it.—*Dave v. The State*, 22 Ala. 35.

It is settled by the decisions of this court, that if one sell the personal property of another, and receive the purchase money, the latter may waive the tort, and sue in assumpsit to recover the purchase money.—*Firemen's Insurance Company v. Cochran*, 27 Ala. 228; *Duncan & Hooper v. Stewart*, 25 Ala. 408; *Strother v. Butler*, 17 Ala. 733; *Crow v. Boyd's Adm'r*, 17 Ala. 51; *Upchurch v. Nosworthy*, 15 Ala. 705. The owner of the property may elect, in such a case, to bring trover, or assumpsit. The statute of limitations to the action which he may elect to bring, will commence running from the time when the cause of action accrues. The action of assumpsit, in this case, was not barred because the plaintiffs' other remedy in tort may have been. The authorities in support of that proposition are clear, and rest upon sound reason. See *Angell on Limitations*, 75, § 5, and authorities cited; and *Godsey v. Bason*, 8 Iredell's Rep. 264.

There was no error in the refusal of the court to exclude the testimony objected to.

The judgment of the court below is affirmed.

DRAKE vs. FOSTER ET AL.

[BILL IN EQUITY BY ASSIGNEE OF PATENT-RIGHT, TO ENJOIN ACTION AT LAW ON NOTE GIVEN FOR PURCHASE MONEY, AND FOR DISCOVERY IN AID OF DEFENSE.]

1. *When bill for discovery merely may be dismissed with costs.*—If a defendant in an action at law files a bill in equity for a discovery merely, in aid of his defense, without first making application to the plaintiff for an admission of the facts sought to be elicited, and the answer denies some of the facts

alleged, the bill may be dismissed, with costs; and if the action at law is brought in the name of one person, for the use of another, it is not sufficient to allege an application to the nominal plaintiff, and his refusal, to admit the facts as to which the discovery is sought.

2. *Estoppel in pais against setting up defense to note.*—If the maker of a promissory note induces a third person to trade for it, by assuring him that he has no set-off against it, and that he will pay it promptly, he cannot afterwards assert any ground of relief against the purchaser.
3. *Objection to competency of witness, when made.*—An objection to the competency of a witness, on the ground of interest, must be distinctly made at the first opportunity, or it will be held to have been waived.

APPEAL from the Chancery Court of Macon.

Heard before the Hon. A. J. WALKER.

This bill was filed by Patrick H. Drake against Lewis A. Foster and Thomas J. Bedell, and its allegations were,—that one John A. Campbell, in 1848, assigned to said Foster, F. M. Reese and F. W. Dillard the patent-right of making and vending, in the counties of Chambers, Macon, Russell, Barbour, Henry and Tallapoosa, "Drummond's patent candle-maker;" that afterwards, on the 20th October, 1848, said Foster, Reese and Dillard, in consideration of \$587 50, sold and assigned to complainant one fourth of their interest in said patent candle-maker; that complainant executed to them, for the said purchase money, his three promissory notes, for \$195 83 each, payable one to Foster, one to Reese, and one to Dillard; that in July, 1849, complainant and said Foster had a settlement of other matters of account between them, and Foster was found in arrears to complainant in the sum of \$50 or \$60; that complainant proposed that Foster should give him a credit for this sum on said note, but Foster preferred to cancel the old note, and to take a new note from complainant for the balance due him; that this was accordingly done, the old note was canceled, and complainant executed to Foster a note, for \$143 63, the sole consideration of which was as above stated; that complainant believed, at the time of his original purchase, and at the time he executed said note to Foster, that said Campbell had the legal right to sell and assign said patent-right, and that said Foster, Reese and Dillard, under their purchase from him, had the right to sell and assign to complainant; that he has since been

informed, and believes the information to be true, that said Campbell had no legal right to sell said patent-right, and that his assignment was void, because it was not recorded according to the act of Congress; that complainant's assignment from Foster, Reese and Dillard is void for the same reason, and conveyed no interest whatever; that said patent-right itself was procured by fraud, and is therefore of no value; that suit has been commenced on said note against complainant, in the name of said Foster, for the use of said Bedell, and stands for trial at the next term of the circuit court; "that complainant is unable to prove the consideration of said note, by any other person than said Foster, the nominal plaintiff in said suit, who has refused, upon application, to become a witness in said suit, and who also refuses, through his counsel, to admit for what said note was given; and that it will be material for his defense to have a discovery from said Foster."

The prayer of the bill is, that the defendants may be required to make full, true and perfect answers to all the allegations of the bill; that the action at law may be perpetually enjoined; that Foster may be compelled to account with complainant, and to refund to him the amount paid by settlement on the original note; and for such other and further relief as the equity of the case may require.

The defendants filed separate answers. Foster denies, in his answer, that the contract between himself and the complainant, and the consideration of the note on which the suit was founded, are correctly stated in the bill, and alleges the facts to be, that he agreed with complainant, previous to the purchase of the patent-right from Campbell, that he would purchase and advance the money for complainant and himself, and that he never would have made the purchase but for this agreement; that complainant was anxious to purchase for himself, but did not have the money; that defendant advanced \$600 on the purchase, of which one half was for the benefit of complainant; that complainant always claimed the benefit of this purchase, and at once engaged in the manufacture of the candle-maker; that Dillard and Reese afterwards consented that complainant might take an interest of one fourth in their purchase, and complainant thereupon executed his

said three notes for \$195 each, which included the amount advanced for him by Foster, together with one fourth of the amount expended in the purchase of stock. He further alleges, that Campbell, at the time his assignment to them was executed, had the legal right to sell and dispose of said patent-right, and that his assignment was regularly recorded; that the purchase of the patent-right, though it did not prove as profitable a speculation as complainant had anticipated, was nevertheless valuable; that the note, on which the action at law was founded, was transferred by said Foster to Bedell, about the time of its maturity, in the presence of complainant, who then assured Bedell that the note was good, and that he would pay it. Bedell also alleges, in his answer, that said note was transferred to him, about the time of its maturity, in the presence of complainant; that complainant then assured him that the note was a good one, and that he would pay it, though he was not able to pay it at that time, and wished indulgence on it; "that he never would have traded for said note, (at least, not without an endorsement or guaranty from said Foster,) but for complainant's said representations and promises."

The deposition of said F. W. Dillard was taken by the defendants, and cross-interrogatories were propounded by the complainant. This witness testified, in answer to a question propounded by the defendants, that he had a conversation with complainant, in reference to the note on which the action at law was founded, in which complainant stated, "that he told Bedell to trade for it,—that he had no set-off, and would pay it promptly." A motion was made, before the chancellor, to suppress this deposition, on the ground that the witness was incompetent by reason of interest; but the motion was overruled.

On final hearing, the chancellor dismissed the bill, at the complainant's costs; holding, on the authority of *Vickers v. Mooney*, 6 Ala. 99, that a discovery from a nominal plaintiff, in aid of a defense at law, was not available against the beneficial plaintiff. His decree, with the refusal to suppress the deposition of Dillard, is now assigned as error.

GEO. W. GUNN, for appellants, made these points:

1. The general rule, that the answer of one defendant cannot be read as evidence against another, does not apply in cases where one defendant claims through another, or where they have a joint interest.—*Julian v. Reynolds*, 8 Ala. 683; *McLane & Plowman v. Riddle*, 19 *ib.* 180; 1 Greenl. Ev. § 187; 2 Dan. Ch. Pr. 982; 6 Cranch, 824; 9 *ib.* 156; 9 Wheaton, 738.

2. The bill is for discovery and relief, and alleges that the nominal plaintiff in the action at law refused to testify; nor could his evidence have been procured by interrogatories at law. When the defense at law cannot be made without the plaintiff's testimony, it is proper to file a bill.—*Mallory v. Matlock*, 10 Ala. 596; *Jones v. Kirksey*, *ib.* 579. Where equity takes jurisdiction for one purpose, it will settle the entire equities between the parties.—1 Story's Equity, § 71; *Nelson v. Dunn*, 15 Ala. 502.

3. In an action brought by the assignee of a note, against the maker, it is a good defense that the consideration was a deed of patent-right, which the payee had no right to sell, because his assignment had not been recorded.—7 Blackf. 136; 6 N. H. 477; 13 Ala. 346; 23 *ib.* 312. That the invention is worthless, is also a good defense to the note.—1 Mason, 182; Paine, 203; Gilpin, 489; 13 Wend. 385; 10 Johns. 23; 2 Paige, 134.

4. Dillard was incompetent from interest.—*Dent v. Portwood*, 17 Ala. 242; *Herndon v. Givens*, 19 *ib.* 313; *Holman's Heirs v. Bank of Norfolk*, 12 *ib.* 399; *Lay's Executor v. Lawson's Adm'r*, 23 *ib.* 377.

J. T. LEFTWICH and SEABORN WILLIAMS, *contra*, contended,

1. That the bill was without equity, because it sought a discovery from a nominal plaintiff, to be used as evidence against the beneficial plaintiff.—*Vickers v. Mooney*, 6 Ala. 99.

2. That the complainant was estopped from asserting any defence against Bedell.—*Lanier v. Hill*, 25 Ala. 554.

RICE, C. J.—It is unnecessary to determine whether the bill in this case is one for discovery merely, in aid of a defense at law, or is one for discovery and relief. It is certainly one or the other. If it is a bill for discovery merely, in aid of a

defense at law, then, as it has been fully answered, and several of the facts charged in it are denied, and the complainant did not apply to the use in the suit at law, in the first place, to admit the facts of which a discovery is sought, there was no error in dismissing it at the costs of the complainant.—King v. Clark, 3 Paige, 76; Bennett v. Sanders, 4 Johns. Ch. R. 503; Steele v. Lowry, 6 Ala. Rep. 124; see, also, Collier v. Chapman, 2 Stew. R. 163; Vickars v. Mooney, 6 Ala. R. 97; Bailey v. Dean, 5 Barb. Sup. Ct. Rep. 297; Williams v. Wann, 8 Blackf. R. 477.

If the bill is one for discovery and relief, then there was no error in dismissing it, because, upon the pleadings and proofs, the complainant is not entitled to relief in a court of equity. It is a sound principle, that where the maker of a note induces a third person to trade for it, by telling him to trade for it,—that he has no set-off, and will pay it promptly, the maker has no ground of relief against him.—Lanier v. Hill, 25 Ala. Rep. 554. The testimony of Dillard brings this case within the influence of that principle, and is fatal to the right of complainant to the relief sought by his bill.

An objection was made that Dillard was interested, and therefore incompetent to testify. This objection came too late. If he was interested, complainant knew it when he filed cross-interrogatories to him; but he did not then make any objection to his competency. The objection was not made until after Dillard's testimony had been taken. As complainant knew of Dillard's interest (if he was interested) before he filed his cross-interrogatories to him, and made no objection until after his testimony had been taken, the objection to his competency was waived, for all the purposes of the present suit.—Hudson v. Crow, 26 Ala. Rep. 515.

We shall not decide whether Dillard was a competent witness in this suit, or whether he will be a competent witness in the trial at law. What we have said above disposes of this case, and requires us to affirm the decree, at the costs of the appellant.

SMITH vs. CAUSEY.

[CASE TO RECOVER DAMAGES FOR INJURIES TO HOGS.]

1. *Admissibility of defendant's declarations.*—In an action on the case, to recover damages for injuries done to plaintiff's hogs, by defendant's children and servants, while driving them out of his field, the defendant's declaration, "that plaintiff's hogs were in the habit of running in his field, and that they should not do it any more", is admissible evidence for plaintiff, because it tends, though remotely, to show that the hogs which were injured belonged to plaintiff.
2. *Evidence confined to matters in issue.*—If the declaration alleges that the injuries complained of were done by defendant's children and servants, plaintiff cannot be allowed to prove injuries done by the defendant himself in person; and defendant's threats that he would kill the hogs are therefore inadmissible, because they tend to show that he did kill them.
3. *General objection to evidence, of which part is legal.*—A general objection to evidence, of which a part is legal, may be overruled entirely.
4. *What authorizes recovery by plaintiff.*—To authorize a recovery by plaintiff, in such an action, it is not necessary to prove that the particular act complained of, if done by defendant's children and servants in the performance of their duty and service, was commanded by the defendant; nor that the defendant's dogs were vicious, and that he knew it; nor that the injury was done entirely by the defendant's dogs.
5. *Unnecessary averment, if descriptive, must be proved.*—If the declaration alleges that the injury was done with the defendant's dogs, the averment, though unnecessary, cannot be disregarded, since it is descriptive of the cause of action.

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. JOHN GILL SHORTER.

This action was commenced in a justice's court, and was removed by the defendant, by appeal, to the circuit court. The plaintiff there filed a statement of his cause of action, in the nature of a declaration in an action on the case, to recover damages for injuries done to his hogs by the carelessness and negligence of the defendant's minor children, servants, and other employees, while engaged with defendant's dogs in driving them out of his field. The defendant pleaded "the general issue", in short by consent; and the cause was tried by a jury. Several questions as to the admissibility of evidence were reserved during the progress of

the trial, which will be readily understood from the opinion of the court. The defendant requested the following instructions to the jury: "1. That if there was no proof that he commanded or authorized the acts causing the injury complained of to be done, they must find for the defendant. 2. That if they did not believe from the evidence that his dogs were vicious, and that he knew that fact, they must find for defendant. 3. That if there was no proof that defendant commanded or authorized the act complained of to be done, or that he knew the vicious propensities of the dogs, they must find for the defendant. 4. That if they believed from the evidence that the injury complained of was done in part by other dogs than those of defendant, they must find for the defendant." The court refused each one of these charges, and instructed the jury as follows: "That if they believe from the evidence that injury was done to plaintiff's hogs, and that such injury was caused by the negligence of defendant's children or servants, while engaged in driving out the hogs, and that it was made their business to drive out stock from the farm, they must find for plaintiff the amount of the damage proved, without reference to the ownership of said dogs, their vicious propensities, or defendant's knowledge of such vicious propensities."

The defendant excepted to these rulings of the court, and he now assigns the same as error, together with the rulings on the evidence.

E. C. BULLOCK, for appellant.

JAMES L. PUGH, *contra*.

WALKER, J.—An issue was made up between the parties. The plaintiff filed a declaration in trespass on the case, for injury done to his hogs by the minor children, servants and employees of the defendant, while engaged for the defendant in the business of driving hogs and other stock out of defendant's field. To this declaration the defendant pleaded not guilty, and upon that plea the trial was had. The rulings of the court, as shown in the bill of exceptions, are the only matters assigned for error.

The court permitted the plaintiff to prove a declaration of

the defendant, "that plaintiff's hogs were in the habit of running in his field, but that they should not do it any more,—that he would kill them." So much of this testimony as conduced to show that plaintiff's hogs "were in the habit of running in the defendant's field", and that "they should not do it any more", was admissible evidence, because it tended, though remotely, to show that the hogs which the servants of defendant injured in expelling them from the field were the property of plaintiff. Under the issue made up, the defendant's threats to kill the hogs were not competent evidence. It was testimony conducing to show, that the defendant killed the hogs. Under the declaration, plaintiff had no right to prove any other damages, than those resulting from the carelessness and negligence of the defendant's children and servants, in the business of driving and chasing hogs from the field. If the defendant injured the hogs himself, or his servants did so by his command, trespass would have been the remedy; and even if case were the remedy, there is no averment in the declaration which would justify the admission of such proof.—1 Chitty on Pleading, 131; Causey v. Smith, 22 Ala. 569.

The court, however, did not err in overruling the defendant's objection to the testimony above set forth, because the objection was a general one to the whole of it, while a part of it was legal.—Gibson v. Hatchett & Brother, 24 Ala. 201.

The defendant excepted to proof tending to show an injury done by him in person to the plaintiff's hogs. This proof was clearly outside of the issue before the jury, and inappropriate to the cause of action set forth in the plaintiff's declaration; and the court therefore erred in admitting it.

The gist of this action is, the injury resulting from the carelessness and negligence of the defendant's servants, while engaged in the employ and service of the defendant, that employ and service being the chasing and driving of hogs from the field of defendant; and it was not necessary, to sustain the action, that the particular act done in the performance of such duty was commanded by the defendant, or that the defendant's dogs were vicious, and he knew it. The declaration alleges that the injury was done with *defendant's* dogs. Under such a declaration, plaintiff could not recover

for injuries done by other dogs; but it would not follow, because a part of the injury was done by other dogs, that the plaintiff could not recover for the part of the injury done by defendant's dogs. From these considerations it follows, that the court properly refused each one of the four charges asked by the defendant.

The court erred in its charge to the jury, that the ownership of the dogs was immaterial. The plaintiff averred that the dogs were the defendant's; and, although this averment was unnecessary, yet, as it is descriptive of the tort complained of, it can not be disregarded. The tort alleged is an injury done by the servants with defendant's dogs. To allow a recovery for an injury done with other dogs, would be to set up by proof a cause of action different from that alleged, and of which the defendant had no notice.—1 Chitty on Pleading, 392; 1 Greenleaf, 63, 64, 65; Causey v. Smith, 22 Ala. 569.

For the errors which we have pointed out, the cause must be reversed, and remanded.

FOUST vs. YIELDING.

[ACTION ON OPEN ACCOUNT—APPEAL FROM JUSTICE'S COURT.]

1. *Charge erroneous, because invading province of jury.*—A charge which takes from the jury the right to determine the truth of the evidence, and to ascertain the facts, invades their province, and is therefore erroneous; as where, under the plea of set-off, it asserts without hypothesis "that the defendant is entitled to recover" the amount of the set-off claimed.
2. *Reversal for erroneous charge.*—An erroneous charge is a reversible error, unless the record clearly shows that it was harmless.

APPEAL from the Circuit Court of Blount.

Tried before the Hon. GEORGE D. SHORTRIDGE.

THIS action (Samuel Foust v. John Yielding) was commenced before a justice of the peace, and was founded on an

open account for \$15 75. The defendant claimed a set-off of \$40, and the justice rendered a judgment in his favor for \$20; from which judgment the plaintiff appealed to the circuit court. The bill of exceptions states the following facts :

“ On the trial of this cause, the plaintiff proved his account for \$15 75, due January 1, 1854, which was not controverted by the defendant. The defendant then proved, under the plea of set-off, by one John Anderton, that plaintiff, defendant and himself entered into a recognizance with one William Patterson, a negro claiming his freedom, for the appearance of said Patterson to abide his trial; that a short time after they had entered into the recognizance, and on the same day, while the three were standing together with said boy, Patterson wanted to know to whom he would first go,—that he was willing to give his labor to his sureties until he obtained his freedom; that Yielding wanted to have the boy a portion of the time, but was willing any way; that witness preferred Foust to keep him; that they went to Foust’s store, and were separated for two hours; that Yielding said, he wanted to have a better understanding with Foust, on what terms he was to keep the boy, and witness told him to wait until Foust had leisure; that after this they had another conversation with plaintiff, at the counter, (the boy not being present,) when witness said, that he would prefer, under the circumstances, that plaintiff should keep the boy, as he would be better able to rescue him, if he should be taken or forced away; that witness asked, if plaintiff was willing to take the boy, and to pay each of the other sureties in proportion to the boy’s work and labor, and, if they could not agree, they would leave it to men; that plaintiff replied, *that* was fair, and he was willing. Witness further stated, that the boy had requested him, previous to entering into said recognizance, to go his security, and said that he would labor until witness was satisfied; that he did not communicate this promise to either plaintiff or defendant, but prevailed on them to go security with him, in order to secure a trial for the boy. Defendant then proved the value of the boy’s services for one year, and that plaintiff had had him twelve months.”

The plaintiff then offered evidence tending to reduce the

amount of the set-off claimed by the defendant, by showing that he (plaintiff) had paid out divers sums of money, and incurred considerable expense, in the prosecution of said Patterson's suit for freedom; but this evidence was excluded by the court, and the plaintiff excepted.

"This being all the evidence, the court charged the jury, that the defendant was entitled to recover of the plaintiff one third of the value of the services of said boy for one year, after deducting the amount of plaintiff's account; to which charge the plaintiff excepted."

The charge of the court, and the rulings on the evidence, are now assigned as error.

D. C. HUMPHREYS, for the appellant.

LOUIS WYETH, *contra*.

RICE, C. J.—The charge of the court below invaded the province of the jury. It took from them their right to determine the truth of the evidence, and to ascertain the facts. Phillips v. McGrew, 13 Ala. 255; Huff v. Cox, 2 *ib.* 310; Yarborough v. Jones, 2 *ib.* 524.

Without considering the other questions raised upon the record, we reverse the judgment, and remand the cause, upon the single ground, that the charge of the court was an invasion of the right of the jury, and that this error is not clearly shown by the record to have been harmless.

COOK vs. COOK.

[ASSUMPSIT FOR MONEY HAD AND RECEIVED TO RECOVER RENT.]

1. *Estoppel against tenant from denying landlord's title*.—Where the tenant has enjoyed the undisturbed possession of the land during the period of the lease, he is estopped, in any proceeding for the recovery of rent, from denying the landlord's title.

2. *Lease by tenant at will, validity of.*—The general doctrine, that the making of a lease by a tenant at will terminates his tenancy, and converts him into a disseisor, must be understood with this qualification, that it has that effect only at the election of the landlord, and that the tenant cannot avail himself of it to avoid the payment of the rent.
3. *Tenancy at will, how determined.*—To determine a tenancy at will, by the landlord's entering upon the land, and there by words declaring it at an end, it is necessary that the tenant should have notice of such words.
4. *Liability of principal for money wrongfully received by agent.*—Although an agent is liable personally for money received by him, by authority of his principal, belonging to another; yet the principal also is liable, whether the money is paid over to him or not.

APPEAL from the Circuit Court of Perry.

Tried before the Hon. ANDREW B. MOORE.

THIS action was brought by Michael Cook against Hilary T. Cook, "to recover \$60, with interest from the 1st January, 1852, for that much money had and received by defendant, to and for the use of the plaintiff." The defendant pleaded, 1st, *non assumpsit*; 2d, payment; 3d, set-off; 4th, accord and satisfaction; and, 5th, fraud. The bill of exceptions states the following facts:

The plaintiff offered in evidence two notes, dated March 3, 1851, and payable to M. Cook, jr., on the 1st January, 1852; one for \$40, "for the rent of his tract of land, known as 'the H. T. Cook tract,' for 1851"; and the other for \$20, "for the rent of land for the year 1851." "The name of the maker of said notes had been torn off; but plaintiff proved that they were made to him by William T. Scott, and were given for the rent of a tract of land, known as 'the H. T. Cook tract,' for the year 1851; that said Scott paid defendant the note for \$20, about the 20th February, 1852, and also paid the other note, some time during the spring of that year, to one William W. Morrow, to whom, as was proved by one Eaves, defendant had handed said note for collection. These facts, except the handing of the note to Morrow, were proved by said Scott, who stated, on cross-examination, that when he rented said land from plaintiff, he told him that he had rented the same from defendant, for the year 1851, and was to pay him \$50 therefor, and to do \$10 worth of repairing to the fencing on said land. Said Scott also testified, in answer

to questions propounded to him by plaintiff, that in April or May, 1851, Michael Cook, sr., who was the father of both plaintiff and defendant, came on said land, where witness was working, and witness stated to him, that he apprehended some difficulty about paying his rent for said land,—that he had rented it from plaintiff, and understood that defendant was claiming the rent,—and asked said Cook to whom he must pay the rent; that Cook then told him, that defendant had nothing to do with the land,—that it was his so long as he lived on it, and that whatsoever plaintiff did about said land, or whatsoever arrangement witness made with him, was right; that neither plaintiff nor defendant was present at this conversation, and he did not communicate the same to defendant. To the introduction of this conversation, between said Scott and Cook, defendant objected, but the court overruled the objection; and defendant excepted.

“Plaintiff then introduced Isaac S. Eaves as a witness, who, on his direct, cross, and re-examination, deposed in substance as follows: That plaintiff, in the fall of the year 1851, being about to go to Louisiana, appointed him and defendant his agents, to take his business in hand and manage it during his absence, and instructed them to collect the claims that were due him, and to pay off the claims that were against him; that the instructions to pay off claims were general, no particular debt or claim being specified; that plaintiff then handed his papers over to witness, and took the joint receipt of witness and defendant; that plaintiff admitted, in the conversation between him and defendant, that in the preceding February he had rented said tract of land from defendant for the year 1851, and had given him his note for \$50, due January 1, 1852, and had agreed to do some repairing to the fences for the rent; that after some discussion between plaintiff and defendant, as to the amount and value of the repairing that plaintiff had agreed to do, they said, that they had at last agreed that said repairing should be estimated at \$10; and it was then and there agreed between them, that defendant should take Scott's said notes, in satisfaction and discharge of said note due him from *defendant* (?) and of said repairs. Witness said, that the only thing which prevented the consummation of said agreement at that

time was, that defendant did not then have said note on plaintiff with him; that plaintiff left for Louisiana a day or two afterwards, and about a week after he left witness delivered up to defendant said notes on Scott, in satisfaction of said note for \$50 and claim for repairs, and received from defendant said \$50 note, which was produced and proved, and was in these words:

‘February 12, 1851.

‘On or before the first day of January next, I promise to pay H. T. Cook, or bearer, the sum of \$50, it being for the rent of my tract or parcel of land, for the year 1851.’

(signed) ‘M. Cook, Jr.’

“Witness further testified, that he had ever since retained said note in his hands, or possession; that when plaintiff returned from Louisiana, in the spring of 1852, witness offered said note to him, and he declined to receive it; that defendant had had possession of said land for more than three years prior to 1851, and went out of possession about 1st February, 1851; that plaintiff admitted, in the conversation referred to, that he had rented and held the land from defendant from 1851, and said nothing whatever of any claim on his part adverse to defendant's. It was also proved that defendant, prior to renting the land to plaintiff, put up buildings, and made preparations to move, and about the time of the renting moved to another place of his own. It was admitted by the defendant, on the trial, that the legal title to the land was in Michael Cook, sr., who was the true owner, and who died in December, 1851, and that defendant had never had any title in writing to the same; but he proved, by one witness, that said M. Cook, sr., in the fall of 1851, said that he had given said tract of land to defendant, and intended to make him a title to it. Plaintiff offered to prove, by one Thomas Cook, that he heard a conversation, in the fall of the year 1850, between said plaintiff and M. Cook, sr., in which the latter said, that the land was only defendant's so long as he cultivated it, and that, when he left it, it was as much plaintiff's as his; and that defendant was not present at said conversation. The defendant objected to the introduction of this evidence, but the court overruled the objection; and defendant excepted.

"Said witness also testified to a conversation, in the fall of 1851, between plaintiff and said M. Cook, sr., about a horse-swap, in which something was said about paying the rent of said land by the boot which the latter was to give plaintiff in said trade; but the witness stated, that he could not say that any agreement in reference to the same was actually made, but that they did not swap horses. To the introduction of this evidence, also, the defendant objected, but the court overruled the objection; and defendant excepted. Plaintiff offered testimony, also, showing that on his return from Louisiana, in February, 1852, on being informed that Eaves had given up Scott's notes to defendant in satisfaction of plaintiff's note to defendant, he refused to recognize said act. The defendant objected to the introduction of this evidence, but the court overruled the objection, and defendant excepted.

"The above is the substance of all the evidence given on the trial, and there was no other evidence tending to show that plaintiff had rented said land from said M. Cook, sr.; or that defendant at any time had notice from any person that plaintiff or said Scott held said land adversely to him, during the year 1851; or that the conversation between Scott and M. Cook, sr., as detailed by said Scott, had ever taken place.

"The court charged the jury as follows:

"1 That although they might believe that defendant had rented the land from plaintiff, and held it under him during the year 1851, by his sub-tenant, Scott; yet, as it was admitted that the title to the land was in M. Cook, sr., and that defendant had no title thereto in writing, defendant was a tenant at will under said M. Cook, sr.; and if the jury believed that defendant took possession and held under and by virtue of a verbal gift from M. Cook, sr., and that the latter intended, by what passed between him and Scott in April or May, 1851, to terminate defendant's tenancy, and to give to plaintiff the rent due from Scott, then plaintiff was entitled to recover the amount of said notes from defendant, in this action, although there was no evidence to show that defendant had any notice of what passed between said Scott and M. Cook, sr., or of any adverse claim of plaintiff to said rent.

"2. That if they further believed that defendant and his

agent, Morrow, received the money due on the notes of Scott to plaintiff, and that defendant placed the \$40 note on Scott in the hands of Morrow for collection, as his agent, and that Scott paid the amount thereof to Morrow before the bringing of this suit, the plaintiff would be entitled to recover, in this suit, the amount so paid to Morrow, although there was no evidence to show that defendant himself had ever received the money.

"3. That if the defendant went into and held possession of said land under his father, and in subordination to his title, and then removed from the land, and rented it to plaintiff, who afterwards obtained the land under an arrangement with his father, and then rented it to Scott; and if the old man, in April, 1851, on Scott's inquiring to whom he was bound to pay the rent, told him that defendant had nothing to do with the land, and that whatever arrangement he made with plaintiff would be right; and if Scott agreed to pay plaintiff the rent,—then the defendant was not entitled to recover the rent, or to apply the proceeds of Scott's notes to the payment of the note on Michael, if the old man intended, by what he said, to put an end to any right of defendant's to recover the rent.

"4. That the agreement to discharge the amount due from plaintiff to defendant, for the rent of said land, with the notes of Scott, and the subsequent delivery of Scott's notes to defendant by plaintiff's agent, in discharge of said rent due to defendant, and the reception and continued detention of said note by plaintiff's said agent, presented no bar to plaintiff's right to recover in this suit,—it being admitted that the title to the land was in M. Cook, sr.; if the jury believed that said M. Cook, sr., by what he said to Scott, intended to terminate defendant's tenancy at will, although defendant may have had no notice of such intention."

The defendant excepted to each one of these charges, and then requested several others, which the court refused to give, and which it is not necessary to notice particularly.

He now assigns for error the rulings on the evidence, the several charges given, and the refusals to give the several charges asked.

I. W. GARROTT, for the appellant:

1. The defendant below was not liable for money paid to his agent, Morrow. If plaintiff could recover at all, it was on the ground that defendant had converted the note on Scott; and, if so, Morrow was in no better position. Defendant could not legally authorize Morrow to do a wrongful act; and as both were wrongdoers, and defendant did not receive the amount of the note, this action would not lie against him.—*Crow v. Boyd's Adm'r*, 17 Ala. 54. If money due plaintiff is received by an agent of defendant, who had no right to receive it, an action for money had and received lies against the agent, but not against the principal, unless he has actually received the money.—1 Chitty's Pleadings, 36; *Hearsey v. Pruyn*, 7 Johns. 182; *Colvin v. Holbrook*, 2 Comstock, 126. The true distinction is, that if the principal had the right to receive the money, and the agent received it in pursuance of his authority, and the plaintiff's claim is in affirmance of the principal's right to receive it, the action for money had and received may be maintained, whenever it is shown that the agent has received the money.—*Costigan v. Newland*, 12 Barb. 459.

2. The plaintiff below rented from the defendant, went into possession under him, and re-let the land to Scott, who occupied during the year; that is, the land was occupied by virtue of the lease from the defendant to plaintiff. Occupying this position, plaintiff could not dispute defendant's right to the rents.—*Archbold's Landlord and Tenant*, 155, and cases there cited; *Wyatt v. Bibb*, 4 Stew. & P. 391; 8 Porter, 500.

3. The agreement to take Scott's notes, in satisfaction of the amount due from plaintiff for the rents, and the subsequent execution of the agreement by the delivery of the notes, amount to a complete settlement and adjustment of the whole case.—*Chitty on Contracts*, 654; 1 Bacon's Abr. 55; *Coit and Woolsey v. Houston*, 3 John. Cases, 248.

4. The conversation between Scott and M. Cook, sr., as against the defendant below, was wholly inadmissible. The defendant did not stand in such a relation towards said Cook, that the declarations of the latter, when defendant was not present, would be binding on him.

5. Eaves and the defendant below were the plaintiff's

authorized agents to collect what was due him, and to pay the debts which he owed. Eaves paid the defendant, and the latter received the payment, in Scott's notes. No fraud, or collusion, is alleged, or pretended. These notes were paid by plaintiff's authorized agent, in satisfaction of the debt due defendant, and in execution of an agreement made by plaintiff himself. Money thus paid certainly cannot be recovered back. It must have been, at least, a voluntary payment.—Chitty on Contracts, 547.

WM. M. BROOKS, *contra*:

1. The defendant admitted, on the trial, that he held possession of the land under and in subordination to the title of his father, who was the true owner, and as his donee in expectancy. He was, therefore, a mere tenant at sufferance, having no right to rent out the land, and subject at any time to be turned out of possession, without notice. His renting it out did not place the true owner in a worse condition than when he was in possession himself; and when he was in possession, the owner's control of the land, and of its rents and profits, was absolute and unconditional. He had the right to rent it, to sell it, to give away the rent, or to direct Scott to pay the rent to whom he pleased; and all his acts and declarations to that effect, whether made or done in the presence or absence of defendant, are admissible evidence. This admission precluded the defendant from objecting to anything said or done by his father in reference to the land.

2. M. Cook, sr., being the true owner of the land, and while defendant was his tenant at sufferance, either gave the rent to plaintiff, or assigned it to him for valuable consideration; and, in either case, plaintiff had the right to recover the rent from Scott.

3. Scott gave plaintiff his notes for the rent, and became bound to pay them to him; and when these notes were collected by defendant, as his agent, he was entitled to the money. The fact that plaintiff had rented from defendant, and the subsequent imperfect agreement to apply Scott's notes in payment of the rent, present no bar to plaintiff's recovery of the proceeds of the note.

4. The payment of the money to defendant's agent was, in

law, a payment to defendant himself; and the action could only be maintained against defendant.—*Costigan v. Newland*, 12 Barb. 457; 1 Camp. 387; 3 *ib.* 139; *Stephens v. Babcock*, 23 English Law & Equity R. 93.

WALKER, J.—In a proceeding for the recovery of rent, the tenant is estopped from denying the landlord's title, when he has enjoyed the undisturbed possession of the land during the period of the lease.—*Perkins v. Governor*, Minor, 358; *Hanks v. Hinson & Patterson*, 4 Porter, 509; *Terry v. Ferguson*, adm'r, 8 *ib.* 502; *Tillotson v. Kennedy*, 5 Ala. R. 407; *Shelton v. Eslava*, 6 *ib.* 233; *Smith v. Mundy*, 18 *ib.* 185; *Rickets v. Garrett*, 11 *ib.* 811.

The general principle above stated, is not disputed in this case; but it is contended that there are features in it, which relieve it from an application of that principle. In the inquiry as to the applicability of the doctrine of estoppel to the relation which existed between appellant and appellee, we purposely avoid the question, whether the appellant was a tenant at will; because, conceding that he was, the judgment of the court below must be reversed. We shall, therefore, proceed to consider the case upon the hypothesis, that the appellant was the tenant at will of Michael Cook, sr., at the time when he rented the land to appellee. Upon the adoption of that hypothesis, there are two questions which arise: first, whether or not a tenant at will can make a valid lease of the land, which is the subject of the tenancy at will; secondly, whether or not the facts in this case, to which the charges must be referred, terminated the tenancy at will pending the lease to appellee, and absolved the appellee from the payment of rent.

The general doctrine is, that a tenancy at will is not assignable, and that the making of a lease terminates the tenancy at will, and converts the tenant at will into a disseizor; but this rule must be understood with this qualification, that the making of a lease by the tenant at will has such an effect at the *election only of the owner* of the land. No other person than the owner has the right to *elect* to regard the lease of the land, which is the subject of the tenancy at will, as a termination of the tenancy.—1 Thomas' Coke, 1st

Am. ed., 147, note 26; 3 *ib.* 643 to 650; *Atkins v. Horde*, 1 Burr. 60; 4 *Comyn's Digest*, 101, note c; 1 *Greenleaf's Cruise on Real Property*, m. p. 244, § 8.

From the principle above stated, and the authorities cited, we conclude, that the fact of the appellant being a tenant at will at the time when he leased the land, which was the subject of the tenancy at will; affords no argument available to the appellee, why he should not pay the rent, which he contracted to pay upon becoming the tenant of him who had the estate at will.

A tenancy at will is determinable at the will of the lessor; and one mode of determining it is, by the lessor's entering upon the land, and there by words declaring it an end. But the better opinion is, that such words do not terminate the estate at will, until the lessee has notice.—1 *Thomas' Coke*, 1st Am. ed., top page 746; 4 *Kent's Com.* 114; *Rising v. Stannard*, 17 Mass. 286; *Phillips v. Covert*, 7 Johns. 1. The condition of estates at will has been meliorated, so far as to give the tenant a right to notice to quit. The words spoken by Michael Cook, sr., when he entered upon the land, as proved by the witness Scott, even though they might otherwise be sufficient, (of which we are not at all certain,) could not have the effect of extinguishing the tenancy at will, because the appellant had no notice of them.

If the agent receives money, by authority of his principal, which belongs to another, the principal is liable, no matter whether the agent paid over the money to him or not. The maxim of the law is, "*qui facit per alium, facit per se.*" It would be unjust, and inconsistent with the analogies of the law, to permit a principal, whose agent had by his authority received money, to excuse himself from responsibility, by saying that he had no right to the money. It would be to allow him to take advantage of his own wrong. The cases cited by the appellant's counsel are to the effect, that the agent can not absolve himself from responsibility, where the authority was wrongfully conferred upon him by the principal.—*Colvin v. Holbrook*, 2 *Comstock*, 126; *Costigan v. Newland*, 12 *Barbour's S. C. Rep.* 456; *Hearsey v. Pruyn*, 7 *John.* 182. But the fact that the agent may be liable, does not exempt the principal from liability. The act of the

agent, done by the authority of the principal, is also the act of the principal.—Story on Agency, 463, § 451. We conclude, that if any person was liable to the appellee for the money received from Scott, the appellant is liable, and that this action is in the proper form.—Crow v. Boyd, 17 Ala. 54; Upchurch v. Nosworthy, 15 Ala.

Several of the charges given, and refusals to charge, and rulings as to the admission of evidence, are in conflict with this opinion; and therefore the judgment of the court below is reversed, and the cause remanded.

MASTIN vs. CULLOM & CO.

[ASSUMPSIT AGAINST SHERIFF TO RECOVER FEES ILLEGALLY EXACTED.]

1. *Construction of statute regulating sheriff's fees.*—Under the Code (§§ 3042, 3047), a sheriff cannot, in any case, be entitled to a fee “for levying *fi. fa.* and making money thereon”, and to another fee, under the same execution, “for levying *fi. fa.* when sale is stayed, after levy, by a restraining order.” Where the restraining order stays the sale of only a portion of the property levied on, and leaves the sheriff free to sell the other portion; and to levy upon and sell any other property of the defendant found in his county, he is not entitled to a fee of “one per cent. on the amount of the judgment”; and if, after levy, the sale of a portion of the property is prevented by injunction, he is not entitled to any fee or commission from the complainant in the injunction suit.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN GILL SHORTER.

THIS action was brought by S. Cullom & Co. against Peter B. Mastin, to recover the amount of certain fees which had been illegally exacted by the defendant, as sheriff of Montgomery county. The facts disclosed by the bill of exceptions are as follows: The defendant, as sheriff of said county, had in his hands six executions, issued from the probate court of Autauga, in favor of William R. Bugg and several others, against Raymond Robinson, James Clipper, A. P. Robinson

and B. F. Robinson, and amounting in the aggregate to \$14,458 44. On the 2d February, 1855, he levied each one of these executions on the following property: on certain negroes, lands, town lots, mules, and cotton, as the property of Raymond Robinson; on the same lands, as the property of A. P. and B. F. Robinson; on a negro man, named Henderson, as the property of B. F. Robinson; and a negro woman, named Vacey, as the property of A. P. Robinson. The mules and cotton were sold, on the 3d March following, for \$1,850 45; the interest of A. P. and B. F. Robinson in the lands, for \$1,000; the interest of Raymond Robinson in the lands and town lots, for \$30 50; the negro Henderson, for \$795; and the woman Vacey, for \$700. The negro woman was sold under mortgage; and the proceeds of sale, except \$23 48, were applied to the mortgage. The proceeds of the sale of all the other property were applied, *pro rata*, to the several executions; and the defendant charged upon each sum the commissions allowed him by law for making money on executions. The sale of the negroes levied on as the property of Raymond Robinson was enjoined, by a writ of injunction from the chancery court at Wetumpka, at the suit of the plaintiffs, S. Cullom & Co.; but all the other property was sold, and the proceeds applied as above stated. After deducting all these credits, there was still due on said executions, in the aggregate, a balance of \$11,043 01; and upon this sum the defendant required the plaintiffs to pay him, and they did pay him, one per cent. commissions, or \$110 43.

This was the money which the suit was brought to recover; and upon these facts, the court charged the jury, that the plaintiffs were entitled to a verdict for \$110 43, with interest from the time of its payment. The defendant excepted to this charge, and he now assigns it as error.

GOLDTHWAITE & SEMPLE, for the appellant:

The Code (§ 3047) expressly grants the commissions charged in this case, and its language is too clear for construction. To say that, where the judgment was for \$10,000, and the property levied on worth only \$100, the whole value of the property would be consumed by the commissions, is no answer to this, though it may be true: it only shows that

the compensation, as fixed by law, would be unreasonable in certain cases. If any compensation is to be given in such cases, it must be made to depend on the amount of the judgment, in order that it may be readily ascertainable. All the statutes, in relation to the compensation of officers, are constructed so as to render their fees ascertainable by a simple calculation; and where the sale of the property is restrained, there are no means of ascertaining its value when the fees become due.

MARTIN, BALDWIN & SAYRE, *contra*:

The clause of the Code under which these commissions were charged, is, in principle, the same as the statute in Clay's Digest, page 235, which gave the sheriff half commissions when the sale was stayed by injunction or *supersedeas*, or not sold for want of bidders. The construction insisted on by appellant, if applied to the old statute, would give the sheriff half commissions for levying on a negro and a horse, if the horse only was sold, and the negro not sold for want of bidders; or, if the negro and horse should both die before the sale, he might claim the commissions under the words, "or other cause." Such a construction is unreasonable, and not warranted by the spirit and intent of either statute. The object of the law was, not to pay sheriffs twice for their services, but to compensate them for their trouble. The statute should receive the construction which was placed on the old law.—*Oswitchee Co. v. Hope*, 5 Ala. 632.

RICE, C. J.—Sections 3042 to 3050, inclusive, compose a chapter of the Code. They relate exclusively to the fees of sheriffs and certain other officers therein named. Section 3042 is in the following words: "Clerks, sheriffs, and other officers hereinafter named, are entitled to receive, for the services hereinafter mentioned, the fees thereto respectively annexed, and no more,—to be paid, taxed, and collected in the manner hereinafter directed."

Section 3047 is the one which prescribes the fees of sheriffs. The only portions of it deemed material to the decision of the case at bar, are two sentences which are in the following words: "For levying *fieri facias*, and making money

thereon: for the first hundred dollars, five per cent.; for all sums over one hundred dollars, and not exceeding two hundred dollars, four per cent.; for all sums over two hundred dollars, two and one half per cent.; but no commissions are to be charged on costs. For levying a *fiери facias*, when sale is stayed, after levy, by any restraining order, one per cent. on the amount of the judgment,—to be paid by the person obtaining such order, and to be taxed for his benefit, if successful, against the adverse party, on the determination of the suit."

No construction of these two sentences can be sound, which would, in any contingency, authorize the sheriff to demand and receive, under one of them, a fee for levying a *fiери facias*, and under the other a fee for levying the same *fiери facias* and making the money thereon. The legislature never intended that he should be entitled to demand and receive, under the same execution, the fees mentioned in both of these sentences. If he is entitled, under a particular execution, to the fee prescribed in one of these sections, he cannot, under that execution, be entitled to the fee prescribed in the other. The specific case provided for by one of these sentences, is where he has not only levied a *fiери facias*, but has made the money thereon. The specific case provided for by the other, is where he has levied a *fiери facias*, but has been prevented from making the money thereon, by a restraining order which stays any sale whatever under the *fiери facias* thus levied.

Whenever he is entitled to receive any fee under the latter of these sentences, he is entitled to "one per cent. on the amount of the judgment." He becomes entitled to that, at the very instant when sale is stayed, after levy, by a restraining order. Suppose, then, that he levies a *fiери facias* upon several articles of property; that after this levy, sale as to only one of these articles is stayed by a restraining order; that he thereupon instantly demands and receives, from the person obtaining such order, "one per cent. on the amount of the judgment"; that he then proceeds to sell under the execution the other articles embraced by his levy; and that such sale yields more than the entire amount of the judgment, interest, costs and fees: is it not clear that, in such case, he would be entitled to the fee prescribed in the sentence first

above quoted from section 3047 of the Code, "for levying *fieri facias* and making money thereon"? We think it is; and the mere fact that he had demanded and received the "one per cent. on the amount of the judgment", when sale was stayed as to the one article of the property levied on, by the restraining order, would not disentitle him to the fee prescribed for levying a *fieri facias* and making money thereon. But we are satisfied that, in the case above supposed, he would not be entitled to demand and receive the one per cent. on the amount of the judgment. We hold, that a sheriff is never entitled to the "one per cent. on the amount of the judgment" prescribed by the sentence last above quoted from section 3047, where the restraining order stays the *sale of only a portion* of the property levied on, and leaves the sheriff free to sell the other portion, and to levy upon and sell any other property of the defendant to be found in his county, under the execution. We further hold, that where, after the execution is levied by him on several articles of property, the sale of *a portion only* of those articles is prevented by *injunction*, he is not entitled to demand or receive from the complainant in the bill, under which the injunction was obtained, any commission or fee under either of the sentences above quoted from section 3047 of the Code.

Although, in what we have above said, we have apparently *conceded* that a *fiat* for an injunction is a "restraining order", within the meaning of section 3047 of the Code, we wish it distinctly understood, that such concession was made because it could not affect the result of this case. We do not decide that a *fiat* for an injunction is a "restraining order", within the meaning of that section; but we remain uncommitted on that point, and uncommitted on the question, whether a restraining order, obtained in a suit or proceeding instituted in, and determinable by, *the court out of which the execution issued*, is not the only kind of restraining order intended or embraced by that section.—See Code, §§ 2407 to 2415, inclusive; Pratt v. Keils, at the present term; Edmondson v. Popkin, 1 Bos. & Pul. 270; and other English cases cited in Fanning v. Dunham, 5 Johns. Ch. R. 122.

The only point made for appellant, in this court, was, that he was entitled, under the sentence of section 3047 last above

quoted, to demand and receive the amount for which he is sued in this action, upon the state of facts shown in the bill of exceptions. Entertaining the views above expressed, we feel bound to decide this point against the appellant; and confining our decision to that point, we affirm the judgment of the court below.

LAWLER, ADM'R, &C., vs. NORRIS.

[ACTION BY ADMINISTRATOR ON NOTE GIVEN FOR RENT OF LAND.]

1. *When court may charge jury to find for defendant if they believe the evidence.*—To authorize the court to instruct the jury, that if they believe the evidence they must find for the defendant, the evidence must be clear, without conflict, and leave nothing to be done except to draw a legal conclusion from the facts.
2. *Presumption in favor of judgment.*—When the bill of exceptions professes to set out all the evidence, it cannot be presumed on error, in favor of the correctness of a charge given, that a fact was proved which is not found in the record.

APPEAL from the Circuit Court of Autauga.

Tried before the Hon. GEO. D. SHORTRIDGE.

THIS action was founded on a promissory note, of which the following is a copy:

"On or before the first day of January next, I promise to pay James A. Lawler, sheriff and administrator of R. H. Gaston, deceased, sixty dollars for rent of land of said deceased. March 23, 1854." (signed). "A. B. Norris."

The bill of exceptions states that the plaintiff read this note in evidence, and then proceeds thus: "It was also in evidence, that plaintiff, as the administrator of said R. H. Gaston, deceased, had publicly advertised the lands of said deceased for rent, and had failed to rent them for want of bidders; that he rented them, in a short time afterwards, to the defendant, who gave the note in evidence therefor; that defendant did not take possession of the lands; that no one

else was in actual possession, and he was not prevented from taking possession; that the lands lay adjoining defendant's lands; that no notice was given to the plaintiff that defendant did not take possession of the lands, until a month after the date of the note; that the lands were not rented to any other person during that year; and that it was too late, after plaintiff received notice that defendant did not take possession, to rent out said lands for that year, to make the usual crop. This was all the evidence in the cause. The court charged the jury, that if they believed the evidence in the cause, they must find a verdict for the defendant; to which charge the plaintiff excepted", and which he now assigns as error.

ELMORE & YANCY, for the appellant, contended that the defendant was estopped from setting up the defense that the renting of the land was unauthorized, and cited the following cases: Lampkin v. Reese, 7 Ala. 173; Alderson v. Harris, 12 *ib.* 586; McCravey v. Remson, 19 *ib.* 430; McRae v. Russell, 12 Ired. L. 225.

S. S. McWHORTER, *contra*, argued that the note was void, because the administrator had no authority to rent the land privately.—Leavens v. Butler, 3 Porter, 380; White & Gayle v. Lester & White, 2 Stew. 331; Caines' R. 147; Fambro v. Gantt, 12 Ala. 298.

WALKER, J.—It does not appear from the bill of exceptions that the renting of land, which was the consideration of the note sued upon, was private, or not at public auction. The note purports on its face to have been given for the rent of the land of plaintiff's intestate; and the bill of exceptions states, that the plaintiff "rented the land to the defendant, who gave the note sued on therefor; but there is not one word in the bill of exceptions, upon the point of the privacy or publicity of the renting. The court charged the jury, that if they believed the evidence, they must find for the defendant; and the bill of exceptions professes to set out the entire evidence. We can not intend, in favor of the charge given, that a fact was proved not found in the bill

of exceptions. To support such a charge, the evidence must be clear, without conflict, and leave nothing to be done except to draw a legal conclusion from the facts.—*Abney v. Pickett*, 21 Ala. 739; *Knight v. Bell*, 22 *ib.* 198; *Hollingsworth v. Martin*, 23 *ib.* 591; *Woodfolk v. Sullivan*, *ib.* 538. It is possible that, under the facts before the jury, it might have been a question whether the sale was private; but it was not the province of the court to determine that question.

From the state of the record, as above described, it results that the question, which was argued by counsel, whether a note given to an administrator, upon a private renting of the lands of the estate, is void, does not arise; and the proof before the circuit court was not such as to justify the court in assuming, that the *prima facie* case made out for the plaintiff by the note was successfully assailed.—*Merriwether v. Taylor*, 15 Ala. 735. We decline to decide the question argued by counsel, because it is not presented on the record.

The judgment of the court below is reversed, and the cause remanded.

JONES vs. STERNS.

[ASSUMPSIT ON COMMON COUNTS FOR SERVICES RENDERED.]

1. *Relevancy of rebutting evidence.*—In an action by an attorney, to recover for services rendered by him as defendant's agent in going to Louisiana, plaintiff proved a conversation between himself and defendant, in which the latter requested him to accompany him to Louisiana as his agent, and he agreed to go; and that they both left the county in which they resided at the same time. *Held*, that defendant, to rebut this evidence, and to show that they in fact went to Texas, and not to Louisiana, might prove that plaintiff had land and slaves in Texas, and had stated that he had gone to Texas with defendant.
2. *Relevant evidence, though insufficient, admissible.*—Evidence which is relevant to the issue, is admissible, without regard to its weight or sufficiency.

APPEAL from the Circuit Court of Conecuh.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by Henry F. Sterns against Churchill Jones, to recover \$815 "for services rendered in making two trips to Shreveport, Louisiana, as agent or attorney for defendant." The exclusion of certain evidence offered by the defendant, which is stated in the opinion of the court, is the only matter assigned as error.

CHILTON, MORGAN & CHILTON, for appellant.

WATTS, JUDGE & JACKSON, *contra*.

RICE, C. J.—It appears from the record, that under the issues joined, one of the material questions of fact on the trial was, whether the appellee went with the appellant to Shreveport, in Louisiana, as his agent or attorney. The evidence introduced by the appellee, touching that question, was, that he and the appellant were both citizens of Conecuh county; that in a conversation between them, the appellant asked him to go to Shreveport, in Louisiana, with him, on business as his agent or attorney, the appellee being a practicing attorney; that the appellee promised and agreed to go; and that they went off about the same time from the county. The time of their leaving was not shown, nor were any particular dates fixed by the evidence. It was shown that the appellee had for years transacted all the law business of the appellant. There was no other proof that the appellee went to Shreveport. The appellant then offered to prove by a witness, that the appellee had land and slaves in Texas; that he had stated several times to the witness, that he had gone to Texas with the appellant; that witness had seen the appellee in New Orleans, in 1851, who wished to send a slave by witness to his plantation in Texas; and that the appellee had told witness, that he had been to Texas frequently. This evidence was offered by the appellant, to rebut the presumption arising from the agreement between the parties to go to Shreveport, in Louisiana, and their leaving Conecuh county about the same time, and to show to the jury that they in fact went to Texas, and not to Shreveport. On objection by appellee, the court refused to permit the evidence thus offered by appellant to go to the jury; and the appellant excepted.

We think, that the evidence thus rejected by the court was

admissible. It certainly *tended* to prove, that the appellee did not go with the appellant to *Shreveport, in Louisiana*. It was the right of the appellant to prove the fact that the appellee did not go with him to Shreveport, and to repel the presumption to the contrary which might have been drawn by the jury from the evidence which had been introduced by the appellee; and any evidence which *tended* to repel the presumption which might have been drawn from the evidence introduced by the appellee, or to prove that he did not go with the appellant to Shreveport, was relevant and admissible, without regard to its weight or sufficiency.—1 Greenlf. on Ev. (5th edition) § 51 *a*; Rutherford v. McIvor, 21 Ala. 750; Anderson v. Long, 10 Serg. & Rawle, 55; Cuthbert v. Newell, 7 Ala. 457; McNeill v. Reynolds, 9 *ib.* 313; Havis v. Taylor, 13 Ala. 324.

For the error of the court below in rejecting the evidence offered by the appellant, its judgment is reversed, and the cause remanded.

RICHARDSON vs. DORMAN'S EXECUTRIX.

[ACTION ON OPEN ACCOUNT FOR MEDICAL SERVICES RENDERED.]

1. *Diploma of physician, when admissible evidence.*—In an action on an open account for services rendered as a physician, a diploma from a medical college would be admissible evidence, if the services were rendered since the passage of the act of 1854, (Pamphlet Acts 1853-4, p. 48,) "to allow all regular graduates of any medical college in the United States to practice medicine"; but, since that act cannot retro-act so as to authorize a recovery for medical services rendered before its passage, and since the Code (§ 977) prohibits a recovery for services rendered by a physician who has not obtained a license from one of the medical boards of this State, a diploma would confer no authority to practice medicine before the passage of the act of 1854, and would therefore not be competent evidence to sustain an action for such services.
2. *Entries on physician's books evidence of what facts.*—The original entries in the books of a physician, which are declared by the Code (§ 2298) to be "evidence for him, in actions for the recovery of his medical services, that the service was rendered", are evidence of the items of his account for medi-

cines administered and furnished to his patients in the course of his practice; but the value of the medicines, as well as of the active services rendered, must be otherwise proved.

APPEAL from the Circuit Court of Greene.

Tried before the Hon. ANDREW B. MOORE.

THIS action was brought by Mrs. Rebecca J. Dorman, as the executrix of her deceased husband, Daniel A. Dorman, against William B. Richardson; was founded on an open account for medical services rendered by the deceased as a physician, during the months of July and August, 1853; and was commenced on the 2d March, 1854. The pleas were, *non assumpsit*, payment, and set-off. On the trial, as appears from the bill of exceptions, the plaintiff admitted that she had notice to produce on the trial her testator's license to practice medicine, and offered in evidence a paper, or parchment, which purported to be a diploma from the university of Vermont in the year 1852, under the seal of the university, and signed by the faculty. "The court permitted this diploma to go to the jury, as evidence of plaintiff's right to recover; provided her right of action was made out in other respects, without any proof in relation to said diploma; and thereupon defendant excepted."

"In the further progress of the trial, the plaintiff offered in evidence the books of her testator, and the entries thereof in relation to the account sued on, which were admitted by defendant to be in the handwriting of said testator. Said entries commenced on the 19th July, 1853, and continued each successive day until the 3d August following, and ran thus: 'For visit and prescription', each day, so much; and, 'For medicine', so much. The amount of medicine charged in this way consisted of laudanum, camphor, morphine, brandy, &c., and amounted to \$12 25; and for visits and prescriptions, \$118. The court permitted these entries to go to the jury, as evidence of the services rendered, and as evidence that the medicines there charged were furnished to defendant by said testator; and thereupon defendant excepted to said entries being evidence for plaintiff, so far as they related to the medicines there charged."

These two rulings of the court are now assigned as error.

W. COLEMAN, for the appellant.

S. F. HALE, *contra*.

WALKER, J.—The Code (chapter 2, title 13, part 1) prohibits the recovery of a physician's account for services as such, unless he had a license from a medical board. The act of 1854 (Pamph. Acts 1853-4, p. 48) permits regular graduates of medical colleges to practice without license. The account sued upon in this case is for services rendered before the adoption of the latter statute, and a suit upon it must be governed by the Code. Under the Code, it is clear that the diploma afforded no authority to practice medicine, and therefore was not competent evidence for the purpose for which it was admitted.—*Mays v. Williams*, 27 Ala. 267.

We think that section 2298 of the Code was designed to make the books of a physician evidence of the items of his account for medicines administered and furnished to his patients in the course of his practice. The administration and supplying of medicines by a physician, under the dictates of his professional skill, constitute, at least in part, the services rendered by him as a physician. He ought, therefore, to be permitted to prove the medicines furnished by him, in his practice as a physician, by the original entries in his books. It must be observed, however, that the value of the medicines, as well as of the active services of the physician, must be proved otherwise than by his books.

The judgment of the court below is reversed, and the cause remanded.

WILLIAMS AND WIFE *vs.* GUNTER.

[DECREE ON FINAL SETTLEMENT OF GUARDIAN'S ACCOUNTS.]

1. *Bill of exceptions necessary*.—The appellate court will not revise any supposed error of the probate court in its decision upon facts, unless it was excepted to, or reserved in some other manner, in the primary court.

2. *Presumption in favor of judgment.*—Where a decree of the probate court, which is free from error on its face, does not appear on its face, and is not shown by bill of exceptions, to be based on an account which is copied into the transcript, the appellate court will not indulge the presumption that it was founded on that account, and on that presumption reverse it.
3. *Limitation of appeal.*—On motion to dismiss the appeal in this case, because it was not taken within six months after the rendition of the decree, (Code, §§ 1888, 2039,) the court said, that the question was one of difficulty and importance, and declined to consider it, because its decision could not affect the result of the case.

APPEAL from the Court of Probate of Pickens.

A. B. CLITHERALL, for appellants.

S. F. HALE, *contra*.

RICE, C. J.—The appellee seems to have been appointed guardian of Susan A. Wilson, as long ago as January 1st, 1837. She afterwards married Thomas G. Williams. The time of the marriage does not appear. On the 6th February, 1854, an entry was made on the record as follows: "Came James Gunter, guardian of Susan A. Wilson, (now intermarried with Thomas G. Williams,) heir-at-law of William Wilson, deceased, and filed his account-current and vouchers for a final settlement of his said guardianship. It is ordered by the court, (*the parties being of age, and waiving notice in a newspaper,*) notice of the filing said account, &c., being given for three weeks, by posting notice thereof on the court-house door of said county, notifying all persons concerned in adverse interest to appear at a term of said court, &c., on the 2d Monday in March next, at which time said account is set for settlement, and contest the same if they think proper."

On the said second Monday in March, the said guardian, and "the said Thomas G. Williams, in right of Susan A. Williams, his said wife," appeared in said probate court, and that court rendered a decree, in favor of said Thomas G. Williams and his wife, for her use, for the sum of \$6,966 70-100, "due her on this settlement." But this decree does not on its face mention or refer to said account; nor does it on its face show upon what evidence the court acted

in attaining its conclusions and results; nor does it on its face disclose any error to the prejudice of appellants. It does not appear that any objection was made, or any exception taken, in the probate court, by any of the parties.

The assignments of error, are, 1st, that the court erred in stating the account as stated; 2d, that the court erred in rendering the decree for the sum stated therein; 3d, that the court erred in not making rests in the account on the final settlement, and so stating the same as to cause the interest to be applied to the payment of the disbursements.

There is an agreement between the attorneys, in the record, as to the transcript, which, however, as we understand it, only relieved the appellants from incorporating in it the entries and papers on file in the court below, which seem to be omitted, and does not make the case any better for appellants than it appears to be from the foregoing statement.

It is the settled practice, that where the probate court has jurisdiction, this court will not revise any supposed error in its decision upon facts, which was not excepted to, nor reserved in any other manner, in that court; and that where the decree of that court upon its face is free from error, and does not *on its face*, or *by bill of exceptions*, appear to be based on an account contained in the transcript sent here, this court will not indulge the presumption, that the decree was founded on such account, and upon such presumption reverse the decree. As that court has power to audit, examine, and correct any such account as appears in this case, if this court were to indulge in presumptions, it would be bound to presume, in the absence of any statement to the contrary, that such power had been exercised, and exercised properly. But, without indulging in any presumptions whatever, it is sufficient, in this case, to say that, applying the settled rules to this record, no error is made to appear, as to any matter embraced by the assignments of error.—Gordon v. McLeod, 20 Ala. Rep. 342, and the cases therein cited.

In passing over the question raised by the motion to dismiss the appeal, because it was not taken within six months after the rendition of the decree, (which motion is founded on sections 1888 and 2039 of the Code,) we mean to be understood as preferring to remain uncommitted upon it, until

there is a necessity for its decision. The question is one of difficulty and importance; and the argument of the counsel for the appellants upon it was certainly very able. Before deciding it, we should give it further consideration. Its decision cannot affect the result of this case; for, however it might be decided, the appellants cannot succeed.

The decree of the probate court is affirmed.

HOUSEMAN vs. STEWART.

[TROVER AGAINST SHERIFF FOR GOODS TAKEN UNDER ATTACHMENT.]

1. *Sheriff's liability in trover for levy of valid attachment.*—The act of a sheriff, in taking the defendant's property under a valid attachment, cannot be converted into a tort, as against a prior fraudulent grantee of the defendant, by the mere fact that the attachment suit is afterwards dismissed by the plaintiff; nor is he guilty of a tortious conversion of the property, when it is taken out of his hands by his successor in office, under another attachment issued by the plaintiff on the same debt, immediately after the dismissal of the first; both attachments, therefore, with their levies, would be competent evidence for him, when sued in trover.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN GILL SHORTER.

TROVER by Jaque Houseman against James J. Stewart, to recover damages for the conversion of a stock of goods; plea, not guilty, with leave to give in evidence any special matter in bar of the action. It appears from the bill of exceptions, which was taken by the plaintiff, that the defendant, as sheriff of Montgomery county, took the goods on the 13th April, 1852, under an attachment in favor of Dorrance & Sons against Paul Marx; while the plaintiff claimed them under a conveyance from said Marx, which was executed on the night of the 12th April. There was evidence, which was introduced by the plaintiff, showing that Marx, who was his brother-in-law, was indebted to him for services rendered as

clerk, and for money lent, and that the goods were transferred to him in payment of this indebtedness; and, on the other hand, the defendant introduced evidence "tending to show that said conveyance was made and received with intent to hinder and defraud the creditors of Marx, and that the debt to Dorrance & Sons, on which said attachment was sued out, was contracted before said conveyance from Marx to plaintiff."

The defendant offered in evidence the attachment under which he took the goods, with the endorsement thereon showing his levy, which was issued and levied on the 13th April, 1852, and was returnable to the May term of the circuit court; and it was also shown that this attachment was dismissed by said Dorrance & Sons, at the ensuing October term of said court, after a plea in abatement had been interposed, and that said levy was dismissed on the 3d November. It was further shown, that said Dorrance & Sons, after said attachment was dismissed, sued out another attachment against said Marx, on the same debt, returnable to the May term of said court, 1853; that this second attachment was received in office by Henry Peebles, who was defendant's immediate successor in said office of sheriff, and was by him levied on said goods "whilst they were still in defendant's possession, and immediately after said first attachment and levy had been dismissed"; that this second attachment was prosecuted to judgment, and said goods were sold under execution issued thereon, and the proceeds of sale applied to the payment of said judgment. "The plaintiff then moved the court to exclude from the jury both of said attachments, with the levies thereon, because they do not constitute any defense in this suit, and are illegal and improper evidence; but the court overruled said motion, and plaintiff excepted."

The court charged the jury, "That if they believed from the evidence that the conveyance from said Marx to plaintiff was made with the intent to hinder, delay and defraud the creditors of Marx in the collection of their debts, and that plaintiff knew and concurred in such intention, and that the goods were afterwards seized by the defendant, as sheriff, under and by virtue of an attachment in favor of Dorrance & Sons, against said Marx, for a debt owing to them before the

conveyance from said Marx to plaintiff; and that said attachment and levy were afterwards dismissed by said Dorrance & Sons, and another attachment afterwards sued out by them against said Marx, on the same debt; and that this last attachment was received in office by the then sheriff of Montgomery county, and by him levied on said goods, whilst they were in the possession of the defendant, immediately after the dismissal of the first levy; and that this last attachment was prosecuted to judgment, and the goods sold under execution issued thereon,—then they must find a verdict for the defendant."

The plaintiff excepted to this charge, and he now assigns it as error, together with the ruling on the evidence.

NAT. HARRIS, for appellant.

H. C. SEMPLE, *contra*.

WALKER, J.—The act of a sheriff, in taking the defendant's property under a valid attachment, can not be converted into a tort against one to whom the property was fraudulently conveyed by the defendant before the levy, by the mere fact that the attachment suit was afterwards dismissed by the plaintiff. If another attachment on the same debt was issued and levied, *immediately after* the dismissal of the first suit, on the same property, by the successor in office of the sheriff who levied the first attachment, and the property was thus taken from the sheriff who first levied upon it, he would not be guilty of a tortious conversion of the property. In a suit to hold the sheriff liable, in reference to the property levied on by virtue of the first named attachment, both the said attachments, and the levies endorsed on them, would *prima facie* be competent evidence.

There is no error in the record, and the judgment of the court below is affirmed.

BUMGARDNER vs. TAYLOR.

[ACTION ON PROMISSORY NOTE—PLEA, STATUTE OF LIMITATIONS—REPLICATION,
SUBSEQUENT PROMISE—REJOINDER, PROMISE MADE ON SUNDAY.]

1. *Promise made on Sunday does not avoid statute of limitations.*—A subsequent promise to pay a debt, whether express or implied, if made on Sunday, does not take the case out of the statute of limitations.

APPEAL from the Circuit Court of Benton.

Tried before the Hon. THOMAS A. WALKER.

THIS action was brought by the appellant, and was founded on two promissory notes. The defendant pleaded the statute of limitations of six years, to which the plaintiff replied a subsequent promise; and the defendant rejoined, that said subsequent promise, if any was made, was made on Sunday, and was therefore void. The evidence adduced on the trial, in proof of the subsequent promise relied on, consisted of the defendant's admission of the justness of the debt, and a promise to pay it by hauling cotton for plaintiff; and this promise was made on Sunday, after one of the notes was barred by the statute, but before the bar was complete as to the other. The court charged the jury, in effect, that the subsequent promise, if made on Sunday, was void, and they must find for defendant; to which charge the plaintiff excepted, and which he now assigns as error, with other matters which it is unnecessary to notice.

G. C. WHATLEY, for the appellant, contended that a promise made on Sunday, though void as a contract, was good as an admission, and cited the following cases; *Kepner v. Keefer*, 6 Watts, 232; *Ray v. Catlett & Buck*, 12 B. Monroe, 535; *Rainey v. Capps*, 22 Ala. 293.

M. J. TURNLEY, *contra*, cited Clay's Digest, 592, § 1; Code, § 1571; *Hooper v. Edwards*, 18 Ala. 280; same case, 25 *ib.* 528.

WALKER, J.—The only question in this case, which it is necessary for us to notice, is whether a promise made on Sunday will take a contract out of the statute of limitations. So far as this question is concerned, there is no distinction between a promise made in the words of the party, and the promise which is inferred from a distinct admission of the justness of a debt, and a liability to pay it. It would be unreasonable, to place the promise inferred from an admission, upon a more favorable footing for the creditor than a promise distinctly and designedly made. In the case of *Hussey v. Roquemore*, 27 Ala. 289, it is held, that a promise made to a creditor's agent, to pay a debt, if he would not sue upon it, upon which the agent acted, could not operate by way of estoppel, because it was made on Sunday. The question in this case is settled by the principle involved in that decision.

It results, that the court did not err in giving the charges excepted to, or in rendering the judgment; and the judgment of the court below is affirmed.

DUMAS vs. HUNTER.

[MOTION TO DISMISS APPEAL.]

1. *Appeal bond insufficient, which misdescribes judgment.*—If the appeal bond misdescribes the judgment, as where the judgment is against the appellant and another, and the bond describes a judgment against the appellant only, the appeal will be dismissed on motion.

APPEAL from the Circuit Court of Fayette.

Tried before the Hon. E. W. PETTUS.

MOTION to dismiss the appeal, on account of the insufficiency of the appeal bond.

E. W. PECK, for the motion.

J. M. VAN HOOSE, *contra*.

RICE, C. J.—The judgment of the court below was in favor of the appellee, and against the appellant and *James M. Cochran*. The appeal bond *misdescribes* this judgment, and describes a judgment against the appellant only. If that bond does not support the appeal, there is nothing else to sustain it. That bond does not support the appeal, because the *misdescription* of the judgment is fatal.—*Satterwhite v. The State*, at the present term, and the authorities therein cited. The appeal is dismissed, at the costs of the appellant.

OWEN vs. ECHOLS.

[MOTION TO DISMISS APPEAL.]

1. *Transcript not filed in time*.—The appeal in this case was dismissed, on motion, because the transcript was not filed until the third term after the appeal was taken.

APPEAL from the Circuit Court of Shelby.

Tried before the Hon. GEORGE D. SHORTBRIDGE.

MOTION to dismiss the appeal, and to strike the case from the docket, because the transcript was not filed within the proper time; the transcript having been filed on the 1st January, 1856, while the appeal was taken to the January term, 1855.

JOHN T. MORGAN, for the motion.

JAMES E. BELSER, *contra*.

WALKER, J.—Two terms of this court have elapsed, since this appeal was taken; and now, at this term, the transcript is delivered to the clerk, to be filed. The case must be dismissed, on the authority of the following decisions: *Cooper v. Maclin's Heirs*, 25 Ala. 298; *Perryman v. Camp*, 24 *ib.* 438; *United States v. Haden & Everett*, 5 Porter, 533; also, Code, § 3030.

MAYS, ADM'R, &C., vs. KING.

[MOTION TO DISMISS APPEAL.]

1. *Bond, or security for costs, necessary to constitute valid appeal.*—A valid appeal cannot be taken, without giving bond, or security for costs, within the period prescribed by the statute of limitations governing appeals: when application is made for an appeal within the prescribed period, but no bond, or security for costs, is given until after its expiration, the appeal will be dismissed on motion.

APPEAL from Court of Probate of Lowndes.

CLOPTON & LIGON, and JAS. E. BELSER, for appellant.

WATTS, JUDGE & JACKSON, *contra*.

WALKER, J.—In this case, a motion is made to dismiss the appeal. The object of the appeal is, to revise a decree of the probate court, on the final settlement of the accounts of an administrator. More than six months elapsed, after the rendition of the decree, before the appeal was taken, or the appeal bond was given. Contemporaneously with the motion to dismiss the appeal, the appellant suggests, that an appeal was really taken before the expiration of the six months, and that a writ of error bond was given at the time; but no appeal bond, or security for costs, was given. Upon that suggestion, his appellant asks a *certiorari* to the probate judge, to obtain the certificate that the appeal was taken within the six months. The *certiorari* is asked upon the supposition, that it is sufficient to protect the appellant from an application of the limitation of six months, if the appeal was prayed within that time, notwithstanding the appeal bond, or security for costs, was given after the expiration of the six months. According to the construction of the sections of the Code bearing upon the subject, there is no appeal until the bond, or security for costs, is given. Consequently, a *certiorari* would be useless, and it is therefore refused. Upon the authorities cited below, the appeal is dismissed.—Code, § 1888; *Carey v. McDougald*, 25 Ala. 109; *Thompson v. Lee*, at the present term.

NEWBERRY'S ADMINISTRATOR *vs.* NEWBERRY'S
DISTRIBUTEES.

[DECREE ON FINAL SETTLEMENT OF ADMINISTRATOR'S ACCOUNTS.]

1. *Annual settlement, effect and validity of.*—The allowance of a credit on an annual settlement of an administrator's accounts (Code, § 1823) is *prima facie* evidence in his favor on final settlement; and if no other evidence is adduced by either party, in reference to the item, than the annual settlement, it is error to disallow the credit.
2. *Compensation of administrator for ordinary services.*—Under the Code (§ 1825), an administrator can not be allowed, as compensation for his ordinary services, more than two-and-a-half per cent. on his receipts, and the same per cent. on his disbursements; and additional compensation can only be allowed for actual expenses and extraordinary services.

APPEAL from the Court of Probate of Cherokee.

D. W. BAINE, for the appellant.

No counsel appeared for the appellees.

WALKER, J.—Upon the final settlement of the appellant, as the administrator, two credits claimed in the account filed were contested. One of those credits was for twenty-two dollars, and was founded on the alleged payment by the administrator of an account against the estate. The other credit was for fifty dollars, claimed for compensation to the administrator. The court disallowed the credit of twenty-two dollars, and allowed only twenty-five dollars of the credit for fifty dollars. It is contended for the appellant, that the court erred in refusing to allow the credit of twenty-two dollars, and in reducing the credit of fifty dollars.

The administrator, in support of the credit of twenty-two dollars, gave in evidence the record of an annual settlement of his administration in the probate court. The annual settlement was preceded by the filing of an account, and the credit of twenty-two dollars is one of the items on the credit side of the account. The decree of the court upon the annual settlement recites, that the administrator "produced satisfactory evidence of each item on the credit side of the

account", and, orders, adjudges, and decrees, "that said account be passed, approved, and allowed." There was no other proof adduced, on either side, in reference to the item. The credit, having been allowed on the annual settlement, was *prima facie* correct; and the administrator, by the record, made out a *prima facie* case in favor of the credit, and could not be required to adduce further proof, until the case so made out was successfully assailed by his adversary. The court, therefore, erred in disallowing the credit of twenty-two dollars upon the proof,—Code, § 1823; Duke's Adm'r v. Duke's Distributees, 26 Ala. 673.

The bill of exceptions shows that the administrator rendered no other than the ordinary services incident to his office. The probate judge was of opinion, that those services were worth more than twenty-five dollars; but he refused to allow more than that sum, because two-and-a-half per cent. on the receipts and disbursements only made that amount. We think the decision of the probate judge on this point was correct. Section 1825 of the Code is as follows: "Executors and administrators may be allowed such commissions, on all receipts and disbursements by them as such, as may appear to the probate court a fair compensation for their trouble, risk and responsibility, not to exceed two-and-one-half per cent. on the receipts, and the same per centage on disbursements; and the court may also allow actual expenses, and for special or extraordinary services, such compensation as is just." The language of this section of the Code leaves no room for doubt, that the ordinary services of an administrator are intended to be compensated by the two-and-one-half per cent. commissions, and that it is only for actual expenses and for special and extraordinary services that a compensation additional to the two-and-one-half per cent. can be allowed.

Before the adoption of the Code, it was the usual practice in this State, to compensate trustees and receivers by a commission; and the courts did not favor the allowance of special compensation for particular services.—Gould v. Hays, 25 Ala. 426; Ashurst v. Ashurst, 13 Ala. 781; Magee v. Cowperthwaite, 10 Ala. 966; Powell v. Powell, *ib.* 900; Harris v. Martin, 9 *ib.* 895. The Code has converted into unbending law, what was before the usual practice, and pre-

scribed a fixed rate of compensation. If the compensation be so inadequate, where the estates are very small, as to lead to public inconvenience, it is the province of the legislature to remedy the evil.

The decree of the court below is reversed, and the cause is remanded, with directions to the court below to proceed in accordance with this opinion.

OGLETREE vs. THE STATE.

[INDICTMENT FOR ASSAULT WITH INTENT TO MURDER.]

1. *Variance*.—Under an indictment for an assault on A, with intent to murder, the defendant's threats, made several hours "previous to the fight", that he would kill B, are not admissible evidence against him.
2. *Intent*.—To constitute an assault with intent to murder, which is a felony by statute, it is not sufficient to prove a general felonious intent, or any other than the particular intent alleged in the indictment; the burthen of proving the alleged intent, as well as the other facts which constitute the felony, is on the State; and its actual existence is a question of fact for the jury, in the decision of which they ought to act upon those presumptions which are recognized by the law, so far as they are applicable, and their own judgment and experience, as applied to all the the circumstances in evidence.
3. *Charge on portion of evidence*.—Under an indictment for an assault with intent to murder, a charge which selects a portion only of the facts disclosed by the testimony, and instructs the jury that, if these facts are proved, "the law presumes that the act was malicious", and that the defendant "intended to kill", is erroneous, because it shifts the burthen of proof, and loses sight of the recognized distinction between civil and criminal cases in the measure of proof; nor is the error cured by further instructing the jury, in a subsequent part of the charge, that these presumptions of law only arise in the absence of evidence tending to qualify or explain the selected facts, and may be rebutted, qualified, or explained away by the evidence, "so that, if they find the facts upon which these presumptions of law arise, with other evidence tending to qualify or explain them, it will be their duty to consider all the evidence in connection, and if, upon the whole evidence, they entertain a reasonable doubt, they should acquit the defendant."
4. *Distinction between civil and criminal cases in measure of proof*.—In a civil action, if the plaintiff establishes a *prima facie* case, the burthen of proof is thereby

shifted, and he is entitled to recover, unless his *prima facie* case is destroyed by proof from the defendant; but in a criminal case, the State being required to prove, beyond all reasonable doubt, the facts which constitute the offense, the establishment of a *prima facie* case only does not take away the presumption of the defendant's innocence, nor shift the burthen of proof.

5. *Charge properly confined to matters in issue.*—The court is not bound to instruct the jury, at the defendant's request, "that they cannot find the defendant guilty of an assault with intent to murder, unless they are satisfied from the evidence, beyond a reasonable doubt, that, if death had ensued from the assault, he would have been guilty of murder in the first degree."

APPEAL from the Circuit Court of Chambers.

Tried before the Hon. JOHN GILL SHORTER.

INDICTMENT against William Ogletree, for an assault on Stephen H. Tiller, with intent to murder him. The bill of exceptions states the following facts: "The State introduced one J. S. Mitchell as a witness, who testified, that an altercation commenced between himself and Ogletree, before the drug-store; that Ogletree, with a stick in his hand, waving it about, commenced cursing him; that the first words were spoken by Ogletree to him; that he then asked Ogletree, if that was the stick he (O.) shook over him in the court-house; that Ogletree replied, it was, and he would do it again; that witness then told him he would see him about it at court, and passed on to his store, and sat down in a chair on the platform in front of the house, and was conversing with a man, when defendant immediately came up, stood in front of him, and commenced cursing him, and shaking over him the stick which he held in his hand; that Stephen H. Tiller, the person who was afterwards cut, came out of the store, and told defendant 'that he couldn't hit Jim Mitchell with that stick; that defendant said, 'Damn you, I'll give it to you', and immediately struck at Tiller with the stick; that Tiller caught the stick in his hand, and defendant drew a dirk-knife, and stabbed Tiller in his right rib; that Tiller did not either strike or kick at defendant before he was stabbed; that defendant advanced upon Tiller in the commencement of the fight. Witness said, that he did not recollect that he had made an affidavit to procure a warrant for defendant, or before whom it was made, and that he had

employed counsel to prosecute defendant. It was in evidence, that witness had made two affidavits to procure warrants to arrest defendant. The State introduced a witness, and asked him, 'Did you hear defendant make any threat, against any person, previous to the fight? if so, what was the threat, and who was it against?' The defendant objected to the question, but his objection was overruled; and he excepted. Witness answered, that he heard defendant say, about 9 o'clock in the morning of the day in the evening of which the fight took place, 'God damn Jim Mitchell, I will kill him.' The defendant objected to this answer, but the court overruled the objection, and permitted the evidence to go to the jury; and defendant excepted.

"Stephen H. Tiller was introduced as a witness, and stated, that he came out of the store when defendant was cursing Mitchell, and told defendant that he could not strike Mitchell with that stick; that defendant then struck at him with the stick, but he caught it in his hand, and, whilst he had hold of it, defendant cut him; that he did not kick at defendant before he was cut, and had no stick or weapon; that he had never seen defendant before, never cursed him, and did not follow him into the grocery; that he did see defendant in McLemore's grocery in January, after the fight took place, but did not tell him that he did not blame him for cutting him; that he did tell a man, by the name of Turner, that he did not blame defendant for cutting him,—that, if he had been in defendant's place, he would have done the same, and that he would, if in such a crowd, cut his way through it; and that he said so then. Another witness for the State testified, that himself and Mitchell were in front of the drug-store where defendant was standing, leaning on a stick; that Mitchell spoke to defendant first, and asked him if that was the stick he had shaken over him, mentioning some former time; that the first words were spoken by Mitchell, to defendant; that defendant replied, it was the stick; that witness and Mitchell passed on to Mitchell's store, and sat down; that defendant came up, squatted down before Mitchell, and commenced talking to him; that Tiller came up, and said to defendant, 'You shall not hit Mitchell with that stick'; that defendant replied, 'Do you take it up? if

you do, come out, and we'll settle it'; that Tiller said, 'If you want to fight Mitchell, you can get a fight out of me'; that defendant then retired off the side-walk, Tiller followed him, and the fight immediately commenced, but witness did not see who struck first. Another witness for the State testified, that he saw a man, by the name of Stanley, strike defendant over the head with a stick, before defendant cut Tiller with the knife. Another testified, that he was present when the quarrel commenced, and that defendant did not have any stick. Another testified, that defendant invited Tiller out to fight, and they both walked out a few steps,—defendant first, and Tiller following him; that defendant, as he stepped off the side-walk, turned around, and struck at Tiller; that Tiller caught the stick, and whilst they were scuffling for the stick, defendant drew his knife, and cut at Tiller, but (he thinks) did not hit him; that he then struck at Tiller the second time, and, whilst in the act of striking the third time, a man by the name of Stanley struck his arm with a stick, and knocked the stick out of his hand.

"Three witnesses for the defendant testified, that they were present when the fight between Tiller and defendant took place, and saw some two or three sticks strike at defendant, and hit him on the head, at or nearly at the same time; and that the fight was very short. One of these witnesses stated, that he saw the commencement of the fight; that some person kicked at defendant as he was stepping off the side-walk; that defendant turned around, and was in the act of striking, when some person caught his stick; and that he saw some two or three sticks then strike defendant over the head. Another testified, that he was present when the fight commenced; that defendant walked out to get off the side-walk, and Tiller followed him; that Tiller, as defendant stepped off the sill of the side-walk, kicked at him, and hit or brushed him on or near the hip; that defendant turned around, and drew back his stick, but witness caught at the stick, and some other person caught hold of it before the blow was struck; that witness saw no more, until he saw Stanley strike defendant two or three blows with a stick over the head. Another testified, that he was present when the fight commenced; that he saw some person strike at defendant with a

stick, before defendant drew his knife, but could not say whether the blow took effect or not; that he saw defendant then strike with his knife the first time, and, whilst in the act of striking again, saw Stanley strike him two or three blows over the head with a stick. It was further in evidence that the fight took place in the town of La Fayette, on a day when there was public speaking during a political canvass; that there was a large crowd of people present, and a high state of excitement prevailing at the time. It was further stated, by some witness who testified as to the threats made by the defendant in the morning, that he was well acquainted with defendant; that defendant appeared to be drinking at the time, and very much excited. Another witness for the State testified, that when he rode into town, on the morning of the day of the difficulty, and was hitching his horse, he saw defendant, and heard him say, 'Damn him, I'll kill him', and added, slapping his hand upon his breast, 'for I've got the tools to do it with'; that he was unacquainted with the defendant, and did not know of whom he was speaking.

"The above, though not a particular and full statement of all the evidence, is substantially the testimony as to the difficulty; and upon this evidence, the court charged the jury, 'That to authorize the defendant's conviction as charged in the indictment, the evidence should satisfy their minds, beyond a reasonable doubt, that the defendant made an unlawful assault upon Stephen H. Tiller, in the county of Chambers, in this State, within three years before the finding of the indictment, and that the assault was made with the intent to kill said Tiller, and that the assault with intent to kill was made with malice; that if they found, from the evidence, that defendant made an unlawful assault upon said Tiller, and stabbed him, with a weapon calculated to take life, and used the weapon in a manner likely to kill, the law presumes that he intended to kill, as death would be the natural result of the act; and if they found, from the evidence, that defendant made an unlawful assault upon said Tiller, with a weapon calculated to take life, and used the weapon in a manner likely to kill, the law presumes that the act was malicious; but that these presumptions of the law, as to intent and malice, arise upon the facts stated by the court, and in

the absence of evidence tending to qualify or explain them, and may be rebutted, or qualified, or explained away by the evidence; so that, in this case, if they should find the facts upon which these presumptions of law arise, and other evidence to qualify or explain them, it will be the duty of the jury to consider all the evidence in connection, and if, upon the whole evidence, they entertain a reasonable doubt whether the defendant made an unlawful assault upon said Tiller, or intended to kill him, or whether the act was malicious, they should acquit the defendant of an assault with intent to murder."

The defendant excepted to this charge, and asked the following: "That the jury cannot find the defendant guilty of an assault with intent to murder, unless they are satisfied from the evidence, beyond a reasonable doubt, that, if death had ensued from the assault, the defendant would have been guilty of murder in the first degree in killing said Tiller; and that they cannot find the defendant guilty of an assault with intent to murder, unless they are satisfied from the evidence, beyond a reasonable doubt, that, if death had ensued from the assault, defendant would have been guilty of willful, deliberate, malicious, and premeditated killing of said Tiller." The court refused these charges, and defendant excepted.

No errors are assigned on the record.

P. M. ALISON, for the appellant:

1. The defendant's threats against Mitchell ought not to have been received as evidence against him, under an indictment for an assault with intent to murder Tiller. The assault and intent must be proved as laid.—Wharton's Criminal Law, 157; Archbold's Criminal Pleadings, 426-7; Roscoe's Criminal Law, 73; 3 Greenl. Ev. § 17.

2. Murder, in this State, consists of two degrees; the first degree embracing every homicide perpetrated with malice, either express or implied. If no malice exists, express or implied, no intent to murder can exist, unless embraced in section 3080 of the Code. This indictment was found under section 3106. The intent constitutes the offense; and it was necessary, in order to make out the charge against him, to show that the assault was made under such a state of facts,

that, if death had ensued to the person assaulted, it would have been murder, and, of necessity, murder in the first degree. To amount to murder, the killing must be willful, deliberate, premeditated, and malicious; and in like manner, the intent, to amount to an intent to murder, must be willful, deliberate, premeditated, and malicious.—Wharton's Criminal Law, 316; Moore v. The State, 18 Ala. 532; Scitz v. The State, 23 *ib.* 42. The evidence in this case, so far from proving the alleged intent beyond a reasonable doubt, shows that the defendant must have been forced to believe that it was necessary for him to strike, in self-defense, in order to save his own life, or to prevent great bodily harm.—Oliver v. The State, 17 Ala. 587; Quesenberry v. The State, 3 Stew. & P. 308.

M. A. BALDWIN, Attorney General, *contra*:

1. There was no error in the refusal of the charge asked by the defendant. The proper charge is, that the assault must be made under such circumstances, that, if the death of the assaulted person ensued, it would have been murder, without stating in what degree.—Scitz v. The State, 23 Ala. R. 43. The statute under which this indictment was found, does not require that the intent must be to commit murder in the first degree: if the intent was to murder, the degree of murder is immaterial.—The State v. Williams, 3 Foster's (N. H.) R. 326; Wright v. The State, 9 Yerger, 342; Moore v. The State, 18 Ala. R. 534. Before any homicide can be murder in the first degree, under our statute, which is in the same language as the Tennessee statute, the intent to kill must be formed before the fatal blow is struck; while this charge asserted, that the intent must be formed before the assault was made.—Dale v. The State, 10 Yerger, 551; Anthony v. The State, Meigs, 276. If this were the law, there could be no such thing as an assault with intent to murder, where the design to take life and the assault were simultaneous.

2. The second charge asked, was also properly refused.—Sharp v. The State, 19 Ohio, 386.

3. That the charge given was correct, see Cole v. The State, 5 English, 318, cited in 11 U. S. Digest, p. 39, § 18.

RICE, C. J.—The indictment is founded upon section 3106 of the Code, and is in accordance with the form which the Code provides for an indictment under that section.—Code, page 700, form No. 16. It alleges that the defendant, “unlawfully, and with malice aforethought, assaulted Stephen H. Tiller, with intent to murder him,” &c.

The offence alleged was not, at common law, a felony; but under our code, it is a felony.—Code, sections 3071, 3106. A misdemeanor, to-wit, an assault, or assault and battery, is necessarily included in the offence with which the defendant is charged; and, according to our code, the defendant may be convicted either of the misdemeanor, or of the felony.—Code, § 3601. But Stephen H. Tiller is the person upon whom the offence, whether considered as a misdemeanor or as a felony, is alleged to have been committed; and it is very clear, that a threat of the defendant, made several hours “previous to the fight” between Tiller and the defendant, in which the assault relied on for a conviction occurred, that he would kill James Mitchell, does not prove, or tend to prove, the offence alleged in the indictment. A threat of the defendant, made at a particular time, to kill a particular man, is not legal evidence to prove that, at a subsequent time, he assaulted a different man, or that he intended to murder a different man. According to all the authorities that have come under our observation, the court below erred in permitting the State to prove the threat of the defendant to kill Mitchell,—it appearing that the threat was made several hours “previous to the fight” between the defendant and Tiller.—*Rex v. Holt*, 7 Car. & Payne, 518; *Morgan v. The State of Mississippi*, 13 Smedes & Marsh. 242; *State v. Williamson*, 16 Missouri Rep. 394; *The State v. Curran*, 18 Missouri Rep. 320; *Johnston v. Br. Bk. at Montgomery*, 7 Ala. R. 379; *Oden v. Rippetoe*, 4 Ala. R. 68; *Morris v. The State*, 8 Smedes & Marsh. 772; *Dowling v. The State*, 5 *ib.* 686; *Patterson v. The State*, 21 Ala. R. 571.

That error makes it our duty to reverse the judgment, and to remand the cause, although no other error may have been committed. But, as the questions raised by the charge of the court, and by its refusals to charge as asked by the defendant,

will probably arise on another trial, we feel bound to express our opinion as to them.

In the consideration of the charge of the court, it is important to bear in mind *the nature and ingredients* of the alleged offense. The defendant is indicted not merely for what *he has effected*, but for what *he intended* to effect; not only for *his act*, but for *the intent* with which he did that act. "The charge against him is, that in consequence of a *particular intent*, reaching *beyond the act done*, he has incurred a guilt beyond what is deducible merely from the act wrongfully performed."—1 Bishop's Crim. Law, § 514. The act, if not accompanied by the *particular intent*, is simply a misdemeanor; but, if accompanied by the *particular intent*, it is, by statute, a felony. *The particular intent* is essential to constitute the felony. The class to which this case belongs, is clearly distinguished from that class in which a *general* felonious intent is sufficient to constitute the offense. The doctrine of an intent in law, different from the intent in fact, although applicable to the latter class, is not applicable to the former. And in such a case as the present, the defendant ought not to be convicted of the felony, unless his intent in fact was the same that is laid in the indictment. Whether he had that intent, at the time of the alleged assault, is a question of fact for the jury to decide; and, in deciding that question, "the jury ought to act upon those presumptions which are recognized by the law, so far as they are applicable, and their own judgment and experience, as applied to all the circumstances in evidence."

The burthen of proving the intent, as well as the other facts which constitute the felony, is upon the State. The law presumes the defendant innocent of the felony, unless *the whole evidence* in the case satisfies the jury that he made the assault with the *particular intent* alleged in the indictment. And in a case like this, any charge is erroneous, which *selects* from the mass of evidence in the case, a *portion only* of the facts disclosed by the testimony, and declares that, if the facts thus selected are proved, "the law presumes that the act was malicious," and that "he intended to kill." Such a charge takes away from the defendant the presumption of innocence, upon *the selected facts only*; whereas, according to law, that presumption cannot be taken away, except by a conviction of his

guilt produced on the minds of the jury by *the whole evidence*. Such a charge loses sight of the distinction, in a criminal case, between a *prima facie* case, and the changing of the burthen of proof; and actually shifts the burthen of proof, by the effect which it imputes to the *selected facts*. In this respect, if in no other, the charge of the court in the present case violates the law. The last sentence of the charge does not cure that error; because, by the hypothesis of the preceding part of the charge, *the court had broken down the presumption of innocence, and shifted the burthen of proof, before the last sentence of the charge* referred the questions of malice and intent to the jury, upon the whole evidence. In a criminal case, the establishment of a *prima facie* case does not, as in a civil case, take away from the defendant the presumption of innocence, or change the burthen of proof. A solid reason for the distinction is, the well known difference in *the measure of proof* in the two classes of cases. In a civil case, the plaintiff is not required to prove, beyond all reasonable doubt, the facts on which he relies for a recovery; and therefore, when he establishes a *prima facie* case, the burthen of proof is thereby shifted, and the *prima facie* case so established entitles him to recover, unless it is *destroyed by proof* from the other party. But in a criminal case, the State is required to prove, beyond all reasonable doubt, the facts which constitute the offense. The establishment, therefore, of a *prima facie* case merely, does not *take away* the presumption of innocence from the defendant, but leaves that presumption to operate, in connection with, or in aid of, any proofs offered by him to rebut or *impair* the *prima facie* case thus made out by the State. A circumstance, *aided by that presumption*, may so far rebut or *impair the prima facie* case, as to render a conviction upon it improper.—Commonwealth v. Kimball, 24 Pick. Rep. 336; Commonwealth v. Dana, 2 Metc. Rep. 340; 2 Starkie on Ev. (edition of 1826,) 738-744, title "Intention"; 1 Bishop's Criminal Law, § 514, and the cases cited in the notes to that section; Burns v. The State, 8 Ala. R. 313; Moore v. The State, 18 Ala. R. 532; Seitz v. The State, 23 Ala. R. 42; The State v. Jefferson, 3 Harrington's Rep. 571; Reg. v. Cruse, 8 Car. & Payne, 541; Oliver v. The State, 17 Ala. R. 587, and authorities cited on page 597 in that case; Henry v. Patrick, 1 Dev.

& Batt. R. 358; Best on Presumptions, 176, § 128; The State v. Ormond, 1 Dev. & Bat. 119; The State v. Will, a slave, *ib.* 121.

If the charges asked by the defendant had been given, they would have imposed upon the jury a duty which the law did not impose on them in this case—the duty of determining whether the defendant would have been guilty of murder in the first degree, if the death of Tiller had resulted from the assault. The inquiries of the jury should be confined to the issue in the case. The issue in this case was, whether the defendant unlawfully, and with malice aforethought, assaulted Tiller, with intent to murder him. The burthen of proof was on the State. If the defendant had asked the court to charge, that proof of an intent *to kill* merely, was not sufficient proof of the intent *to murder*; or that proof of an intent to wound, or maim merely, was not sufficient proof of the intent to murder, the charge should have been given.—The State v. Burns, 8 Ala. R. 313; Scitz v. The State, 23 Ala. R. 42; Moore v. The State, 18 Ala. R. 532, and other authorities cited *supra*. But the court was not *bound*, at the defendant's request, to charge the jury, that they could not find the defendant guilty of the felony, without first coming to the conclusion that, *if he had killed* Tiller by the alleged assault, he would have been guilty of murder in the first degree, or of “a willful, deliberate, malicious, and premeditated killing.” No actual killing was alleged, or proved, and the court was not therefore *bound* to charge anything as to an actual killing. If the defendant made an unlawful assault on Tiller, with malice, and with an actual intent to murder him, he is guilty of the felony; otherwise, he is not guilty of the felony.

For the error in admitting the evidence of the threat to kill Mitchell, and the error in the charge of the court, the judgment is reversed, and the cause remanded. The usual order must be here entered, directing that the defendant be remanded to the custody of the proper officer in Chambers county, there to remain until discharged by due course of law; for which, see a precedent at the conclusion of the opinion in Spencer v. The State, 20 Ala. R. 24.

BARLOW vs. LAMBERT.

[ACTION ON NOTE GIVEN FOR THE HIRE OF A SLAVE.]

1. *Common law, how far in force in this State.*—The common law of England, as changed and modified by our statutes, is part and parcel of the law of this State, so far as applicable to our institutions and government.
2. *Evidence of custom, admissibility of.*—Evidence of a local custom is admissible, to supply details in a contract, either oral or written, as to which the contract itself is silent; or to show that provincialisms, and technicalities of science and commerce, have acquired a known, fixed, and definite meaning, different from their ordinary import; or where such technicalities, unexplained, are susceptible of two or more reasonable constructions: but it cannot be received to contravene any positive requirement of the law, any principle of public policy, or an express contract, whether oral or written, nor to give to plain and unambiguous words or phrases a meaning different from their natural import; and it is therefore inadmissible to show that a stipulation, in a contract of hiring, that the hirer was to "lose the negro's lost time," "related to time lost by sickness or running away, and not to time lost in consequence of the negro's death."
3. *General objection to evidence.*—If evidence is offered as a whole, when a portion of it is illegal, the court may, on objection, exclude the whole of it.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by Andrew Lambert against Robert Barlow and Uriah Barlow, and was founded on the defendants' promissory note for \$175, dated January 1, 1853, and payable twelve months after date. The pleas were, a tender before suit brought, and the general issue, with leave to give any special matter in evidence as a bar to the suit. It was proved on the trial; that the note was given for the hire of a slave; and the witness who testified to the contract of hiring, one J. F. Boyles, stated, that at the time the contract was made, and before the note was executed, "plaintiff told defendant that he (defendant) would have to lose the negro's lost time, without specifying how that lost time might occur,—whether by death or otherwise; and that defendant agreed to it,—saying, that he would lose that time of course." The defendants offered two witnesses, "to prove that the words, 'lose the negro's lost time,' as used in the contract of hiring

to which Boyles testified, had a general and well understood meaning in Baldwin county, where said contract was entered into; and that they related to time lost by sickness or running away, and not to time lost in consequence of the negro's death. They also offered evidence to prove a general and well known custom in said county, where a hired negro died during the year for which he was hired, for the owner to deduct all time from the period of the negro's death; which testimony the court ruled inadmissible, and the defendants excepted. The defendants also proved, that said negro died, during the year, without their fault. The court charged the jury, that the plaintiff was entitled to recover the full amount of the note, with interest, unless they believed from the evidence that plaintiff, when he hired said negro, agreed to make an abatement for the time lost by the negro in case he should die before the expiration of the year."

WM. G. JONES and ROBT. B. ARMISTEAD, for the appellant:

Two questions are presented on the record: 1st, whether the evidence offered to show a local custom, which was excluded by the court, was admissible; and, 2d, whether the charge of the court is correct.

1. The custom was reasonable, general, and well known; and the evidence, therefore, ought to have been received.—Adams on Contracts, 151-2; Partridge v. Forsythe, at present term.

2. The question presented by the charge of the court has never been directly decided in Alabama. In Perry v. Hewlett, 5 Porter, 318, it is said that the owner may recover the whole hire, though the slave die before the expiration of the term; but an examination of the case will show that this is a mere *dictum*. The weight of authority, especially in the slaveholding States, is strongly and decidedly in favor of the principle, that the hire should be apportioned, and that the owner should recover only for the time the slave lived.—George v. Elliott, 2 Hen. & Munf. 5; Bacot v. Parnell, 2 Bailey, 424; Dudgeon v. Teass, 9 Missouri, 857; Collins v. Woodruff, 4 Eng. (Ark.) 463, cited in 10 U. S. Digest, 59, § 23. The doctrine of apportionment seems most just and equitable, and most consistent with principle. The case of Harrison v. Murrell,

5 Monroe, 380, which holds the contrary doctrine, goes upon a mistaken analogy to the renting of real estate, and supposes the hirer to acquire a title to the thing itself that is hired. It is rather a contract for services to be rendered, and the hirer acquires only the title to the temporary use of the thing. The hirer of a carriage from a livery-stable, for an hour, a day, or a week, gets no title to the carriage itself, but only a right to use it temporarily; and if the horses, on leaving the stable door, run off, and break it to pieces, without his fault, he is not bound to pay the whole hire. Why should a contract for the services of a slave be different? Hiring is a contract of bailment; renting, or leasing, is not. The bailor may maintain trespass or trover, for an injury to, or conversion of the thing, whilst in the actual possession of the bailee; a landlord, or lessor, cannot.—3 Stephens' N. P. 2632, 2636; 9 Bacon's Abr. 454-5; Booth v. Terrell, 17 Ga. 20.

WM. BOYLES, *contra*:

1. The hirer of a slave for a definite period is a purchaser for the term; if the slave die before the expiration of the term, the loss must be borne by the hirer; and he cannot resist a recovery, by showing that the act of God prevented him from deriving a benefit from the contract, unless by its terms provision is made for such a contingency.—8 Porter, 133.

2. A particular usage may be given in evidence, to influence the construction of a contract, or to explain the sense in which words or terms are used; but, when the contract is established, and is not governed by the commercial law, it is not allowable to change its character, and to attach to it conditions in opposition to established rules of law.—Petty v. Gayle, 25 Ala. 472. No offer was made, in this case, to show that the custom had existed for any length of time.—Center & Co. v. Jewell, 26 Ala. 506; Partridge v. Forsythe, at present term.

STONE, J.—The constitution of the State of Alabama (Art. II, § 1) declares, that "the powers of the government of the State of Alabama shall be divided into three distinct departments, and each of them confided to a separate body of magistracy—to-wit: those which are legislative to one; those which are executive to another; and those which are judicial

to another." The first section of the third article contains this language: "The legislative power in this State shall be vested in * * * the general assembly of the State of Alabama." By the "schedule" attached to the constitution of the State, (§ 5,) the "territorial laws, not repugnant to the constitution," were continued of force.

The acts of 1828 and 1832, (Clay's Digest, p. 383, §§ 11, 17,) adopted the rules of the law merchant, as to days of grace, demand, protest, and notice, so far as the same affect bills of exchange, and bonds and other instruments payable in bank. The Code (§§ 1525, 1526) adopts the "commercial law," as governing the same classes of instruments, with provisions somewhat variant.

The Code superseded all the "acts of a public nature," theretofore passed, and which were "designed to operate on all the people of the State, not embraced in said Code"; except that the acts of the legislature passed at the session of 1851-2, whether approved before or after the adoption of the Code, were not repealed or affected by the Code, "but such laws supersede any provision of the Code with which they conflict."—Code §§ 11, 12.

In *Cawood's case*, 2 Stew. 360, this court held, that under the 2d "article of the ordinance of 1787, "which was afterwards made the fundamental law of" this territory, "the common law of England, *so far as applicable*," was made a rule of action for our government, "both in civil and criminal cases." By a series of decisions, running through our entire judicial history, the above doctrine has been firmly established; and it must now be admitted, that the common law, qualified as above, is part and parcel of the law of this State.

We believe we have thus exhibited the sources, organic and written, from which our rules of action are mainly derived. The constitution, in the distribution of the "powers of the government," having conferred the "legislative power" on the "general assembly," the question may arise, Under what authority, by what warrant, are we brought under the dominion of other *rules of action*? Is it sound, is it consistent with the genius of our government, that any portion of the community less than the whole—any city, town, village, or neighborhood—shall exercise powers which the constitution has con-

ferred alone on the general assembly? Shall such "portion of the community" make unto themselves a law which shall overrule the general law? It becomes us to feel our way cautiously, lest there grow up in our midst some *third estate*, which shall, in time, usurp the government.

While we are not prepared to say that "customs," or "usages," for certain purposes, and under certain restrictions, may not, and do not, rightfully exist, we own ourselves "no friends to the almost indiscriminate habit, of late years, of setting up usages, or customs, in almost all kinds of business or trade, to control, vary, or annul the general liabilities of parties under the common law, as well as under the commercial law."—The Schooner *Reeside*, 2 Sumner's R. 567.

Like most other subjects, on which the minds of men differ, the decisions of the courts, defining what usage or custom may or may not do, have been far from uniform. Much confusion and inaccuracy have crept into the adjudged cases, so that any attempt to reconcile them would necessarily prove abortive. Custom, long acquiesced in, and sanctioned by judicial decision, has given us the systems of laws known as the common law and the law merchant. These systems are judicially taken notice of, and are not the subject of proof.—*Hogan v. Reynolds*, 8 Ala. 59. These systems, then, may be declared to have obtained the dignity of law. Local customs, or particular usages, can claim no such eminence. They are not, and cannot become, a rule of action "prescribed." They never assume a character so binding, as that parties cannot, by agreement, place their contracts without their influence. So, when custom and contract come in conflict, the latter prevails over the former. They are, at most, but a part and parcel of the contract,—the subject of proof like other facts,—and are only binding, because they are a part of the contract. Not that the proof in each case shows that the parties, *in fact*, incorporated the custom into their contract; but that by the testimony, it is shown that the particular custom is so general and so known, as to raise the inference that the parties knew of its existence, and contracted with reference to it. It is, in effect, nothing more than one means of establishing a material fact; a case of presumptive evidence. The fact to be established is, that a certain element or stipulation entered into

the contract or agreement of the parties. That element or stipulation was either not expressed in the contract, or, if expressed, the parties either can not, or do not, offer proof of the direct fact. In such case, the rule declares that proof may be made of the local custom or usage, in order that from its existence the supposed element or stipulation may be safely and satisfactorily deemed to be incorporated into the contract. If the proof fail to raise this inference, it should be regarded as insufficient. When custom has been sufficiently proved, it becomes a part of the contract, not *the law* of the case.—Jones v. Fales, 4 Mass. R. 252; Halsey v. Brown, 3 Day, 346.

It follows from what is said above, that custom cannot overturn the positive requirements of the law, or the express contracts of the parties, whether the contracts be evidenced by writing or not.—Renner v. Bank of Columbia, 9 Wheat. 587. Neither can custom contravene any principle of public policy.—Luarden v. Warder, 3 Rawle 107; Dunham v. Day, 13 Johns. 44; Gallatin v. Bradford, 1 Bibb, 209; Williams v. Gillman, 3 Greenl. 281; Waters v. Lilly, 4 Pick. 145.

Evidence of custom cannot be received, to give to plain and unambiguous words or phrases a meaning different from their natural import.—Schooner Reeside, 2 Sum. 567; Turney v. Wilson, 7 Yerg. 340; Ivey v. Phifer, 13 Ala. 824. This principle rests on a sound public policy. Oral evidence cannot be given to vary or contradict, enlarge or qualify a written contract, or to prove that the parties intended differently from the legal import of their language, although witnesses may testify, directly and positively, to such different intention. Neither can such result be attained indirectly, by proof that a local custom exists, and has become so known and general, that parties are presumed to have contracted with reference to it, and thus made the custom a part of their agreement. The former is an offer to make direct proof of an inadmissible fact; the latter, an effort to prove circumstances, or facts, from which to infer *the fact*, which, when offered directly, is inadmissible. The statement of such a proposition is its refutation.

We hold, then, that proof of custom may be received, to supply the details of a contract, either written or oral, where

the contract is silent in its details, unless such custom contravene the positive requirements of the law, or some principle of public policy.—The Schooner *Reeside*, 2 Sumner, *supra*; *Jones v. Fales*, 4 Mass. 243; *Rankin v. Amer. Ins. Co.*, 1 Hall's Rep. 619; *Gibson v. Cuyler*, 17 Wend. 305; *Ala. & Tenn. Rivers Railroad Company v. Kidd*, and *Partridge v. Forsythe*, at the present term.

It may also safely be laid down, that where by local custom, or usage, provincialisms, and technicalities of science and commerce, and perhaps some others, have acquired a known, fixed, and definite meaning, different from their ordinary import; or, where such technicalities, unexplained, are susceptible of two or more plain and reasonable constructions, it is certainly competent to prove the existence of such custom, as a means of showing the sense in which the contracting parties intended to be understood.—*Murray v. Hatch*, 6 Mass. 465; *Winthrop v. Union Ins. Co.*, 2 Wash. Cir. Ct. Rep. 10; *Sleght v. Rhinelander*, 1 Johns. 192; *Boorman v. Johnson*, 12 Wend. 572; *Cowen & Hill's Notes to Phil. Ev.* 3 vol. p. 1409; *Barger v. Caldwell*, 2 Dana, 130.

We are aware that, in some adjudged cases, principles are asserted in conflict with some of the rules expressed above. The same remark may be predicated of some loose *dicta* found in other cases, and some of the elementary writers. Of this class are the following: *Middleton v. Heyward*, 2 Nott & Mc. 9; *Bank v. Paige*, 9 Mass. 155; *Homer v. Dorr*, 10 Mass. 26; *Bouv. L. D.*, "Custom," and cases cited; *United States v. McDaniel*, 7 Peters, 15; *Coit v. Com. Ins. Co.*, 7 Johns. 385; *Boorman v. Johnson*, 12 Wend. 572; *Smith v. Wilson*, 3 Barn. & Adol. 728; *Cutler v. Powell*, 6 T. R. 320. A *dictum* in *Price v. White*, 9 Ala. 563, is perhaps obnoxious to this criticism.

The words testified to by the witness Boyles, as a part of the contract of hiring, that the hirer was to "lose the negro's lost time," are plain and unambiguous. They have but one legitimate meaning, and it was not permissible to give to them a different meaning, either by direct or indirect proof, as was proposed in this case. If the contract had been silent on the matter of the negro's lost time, we do not say that the alleged local custom of Baldwin county, was not a legitimate subject

of proof, if offered alone. It was not so offered, and we need not now decide that question.

There is no error in the record, and the judgment of the circuit court is affirmed.

ALBERTSON, DOUGLASS & CO. *vs.* GOLDSBY.

[TRIAL OF RIGHT OF PROPERTY IN SLAVES, BETWEEN PLAINTIFFS IN EXECUTION AND JUNIOR MORTGAGEE OF DEFENDANT IN EXECUTION.]

1. *Lien of execution, how lost.*—The lien of an execution, which has been levied on personal property, is lost, as against an intermediate mortgagee, by an order to the sheriff to postpone the sale until after the return term of the execution, and to let the property remain in the possession of the defendant without requiring bond.
2. *Estoppel in pais.*—Conceding that a mortgagee, who, prior to the execution of his mortgage, consented to a postponement of the sale of the property under execution against the mortgagor, is thereby estopped, in a contest with the plaintiff in execution, from saying that the delay is constructively fraudulent as against his mortgage; yet this does not prevent him from taking advantage of a subsequent postponement without his consent.
3. *Attorney's authority after judgment.*—An attorney's authority does not cease with the rendition of the judgment, but continues for the purpose of controlling the process for its collection; and hence the lien of an execution may be lost, by the attorney's order to the sheriff, without instructions from his client, to postpone the sale of property levied on, and to allow the property to remain in the possession of the defendant in execution.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. ANDREW B. MOORE.

THE appellants were plaintiffs in execution against Sturdevant & Jones, and levied on certain negroes, as the property of said Jones, to which a claim was interposed by the appellee under a mortgage from said Jones. The facts disclosed on the trial of the claim suit, as stated in the bill of exceptions, were these:

"The plaintiffs read to the jury their judgment against said Sturdevant & Jones, which was rendered in the circuit court

of Dallas on the 11th November, 1852, for over \$8,000, and upon which an execution was issued on the 29th November, 1852, was received by the sheriff of the county on the 1st December following, and was levied by him, on the slaves now in controversy, with others, on the 30th December, 1852; and said execution was read in evidence. The sale of said slaves was postponed by plaintiffs' attorneys, until the 1st May, 1853, or until further orders, as shown by the following letter:

"Circuit Court, Dallas County.

'The sheriff will postpone the sale of the property levied on in this case, until the first Monday in May next, and need make no further levy, unless otherwise instructed hereafter. We also approve the levy as made, and waive the taking of a forthcoming bond for the property levied on, and will not hold the sheriff responsible for the forthcoming or delivery of the property at the day of sale, or other time, but will rely upon a delivery by the defendant.

'Selma, December 31, 1852.' 'LAPSLEY & HUNTER,'

'Att'ys for plaintiffs.'

'P.S. The sheriff will also hold the execution, without returning it, till the 1st Monday in May, the day appointed for the sale.'

"L. & H."

"On the first Monday in May, 1853, the sale was further postponed, by order of the plaintiffs' attorneys, until the 12th July, 1853; and on that day, a *venditioni exponas* was issued by the clerk, to the said sheriff, and received by him on the same day, and he made this return on the same: 'Sale postponed by plaintiffs' attorneys, to the 1st January, 1854.' A second *vend. ex.* was issued on the 7th November, 1853, and the sheriff made the following return thereon: 'Levied this execution, 8th February, 1854, on the following slaves [naming them] as the property of defendant Jones. Sale postponed to the first Monday in March, 1854, by the plaintiffs' attorneys.' (Signed by the sheriff.) 'The following property was this day claimed by T. B. Goldsby, who gave bond for trial of the right of property at next circuit court, March 6, 1854.' (Signed by the sheriff.) It was further proved, that the slaves levied on under the first execution and the last *vend ex.*, were the same, and that they were in the possession of

said Jones at the time of each levy. Plaintiffs further proved the value of said slaves at the time the bond for the trial of the right of property was given.

"The claimant, to show title in himself, then introduced a mortgage from said Jones, with the certificate and registry thereof," which was dated 19th January, 1853, and recorded on the 25th January; "and proved, that said mortgage was made in good faith, that the slaves levied on are the identical ones named in the mortgage, and that they were in Dallas county when the mortgage was executed. The plaintiffs then proved, that the object of postponing the sale, under the first execution, was to accommodate said defendant and said T. B. Goldsby, and to benefit the plaintiffs, by getting security for \$5,000 of the debt; that the second postponement was ordered, because defendant had secured \$5,000 of the debt, and paid \$1,500 in money, and plaintiffs' attorney was anxious to collect the money without selling the property, and because defendant gave him assurance that they would soon pay the money; that these were the sole reasons which induced plaintiffs' attorney to postpone the sale, and that this was done without instructions from plaintiffs. The following statement of plaintiffs' attorney was then read in evidence:

"The defendant in execution and T. B. Goldsby applied to me to stay proceedings on the execution, and at their joint solicitation I agreed to do so, on condition that said Goldsby would become surety for defendants, on their debt to plaintiffs, to the amount of \$5,000; with the understanding, that the lien of the plaintiffs, under their execution, should be continued. There was no agreement with Goldsby, in express terms, to this effect; but it was distinctly stated by me, as one of the conditions on which I assented to the postponement, and assented to by all parties, so that the lien of the plaintiffs should be continued. This was on the 31st December, 1853, or about that time, but prior to the execution of the mortgage to Goldsby. Goldsby, previous to that time, had had a mortgage on the property, to secure debts owing to him by the defendant; but the mortgage which was executed prior to the judgment, had not then been released, and, as was understood, does not [the word is illegible] on the property. It was agreed, at the time, between Jones and

Goldsby, that Jones would execute a new mortgage to Goldsby, which I was requested to prepare, and which I did prepare soon afterwards, and which is the mortgage under which Goldsby now claims. The statement which I made, as to the continuance of the plaintiffs' lien, had express reference to this mortgage which was to be executed.

(signed)

'J. W. LAPSLEY.'

"It was admitted, that the slaves remained in the possession of Jones, from the time of the first postponement of the sale, until the 8th February, 1854; and it was proved, that said Goldsby consented to the first postponement, and to the return of the property to the defendant under the first postponement. This was all the evidence introduced on the trial; and the court charged the jury, that if they believed the evidence, they must find for the claimant."

The plaintiffs excepted to the charge of the court, and they now assign it as error.

WM. M. BYRD, for the appellant:

1. After a levy, the sheriff may make the defendant in execution his bailee, and leave the property levied on in his possession.—*Lampton v. Taylor*, Litt. Sel. Cas. 277; *Lyon, Cobb & Co. v. Stewart*, 5 J. J. Mar. 679; *Richardson v. Bartley*, 2 B. Monroe, 332.

2. But, if this position be untenable, it is insisted that the sheriff, with the consent of the creditor who is attacking the lien of the execution, may make the defendant in execution his bailee, and the creditor cannot afterwards assert a lien, by virtue of an after-executed mortgage on the same property, so as to defeat the lien of the execution.—*Leach v. Williams*, 8 Ala. 766; *Campbell v. Spence*, 4 *ib.* 550.

3. Where property has been once levied on by the sheriff, and left in the hands of the defendant as bailee, and the execution is stayed until or beyond a term of the court from which it issued, a *venditioni exponas* is the proper writ to be afterwards issued.—*Quinn v. Wiswall*, 7 Ala. 650.

4. A *vend. ex.*, regularly issued, will continue the lien of the original execution as to property levied on under the first execution.—*Quinn v. Wiswall*, 7 Ala. 650; *Locke v. Coleman*, 4 Monroe, 316.

5. The stay of an execution by an attorney, without any consideration moving from the defendant to the plaintiff, will not work a forfeiture, nor destroy the lien of the execution, as against a mortgage creditor who had notice of the execution, and consented to the stay, and to the property being returned to the defendant after levy.—Wood v. Garey, 5 Ala. 43.

6. An attorney at law has no authority to waive or destroy a lien of his client. He has no power, as attorney, to bind his client by the stay of an execution.—Holbert v. Montgomery, 5 Dana, 13; Kirk v. Glover, 5 Stew. & P. 340; West v. Ball, 12 Ala. 340; Lockhart v. Wyatt, 10 *ib.* 231.

CHILTON, MORGAN & CHILTON, *contra*:

1. By the lapse of an entire term, without an *alias fi. fa.*, the plaintiffs' lien was lost. The lien was not preserved by the *vend. ex.*, which is a part of the *fi. fa.*, is included in it, and determines with it.—Hughes v. Rees, 4 M. & W. 468. The purpose of the *vend. ex.* is merely to "quicken the sheriff to his duty." It confers no additional power on him, but forces him to sell, after levy.—Comyn's Digest, tit. "Execution," C (8); Clerk v. Withers, 6 Mod. 398; 2 Saund. R. 47, n. 2; 3 Bibb, 345.

2. The writ provided by statute (Code, § 2454), for exposing to sale property seized under levy, is strictly analogous to the *vend. ex.* at common law, and can, therefore, only be used during the lifetime of the *fi. fa.*, so as to protect the lien of the plaintiff in execution against any which may subsequently attach.

3. In this case, the second *vend. ex.* was sued out after the lapse of an entire term; hence, the original *fi. fa.* having expired, there was none of which it formed a part, and to which it was auxiliary. As to junior executions, therefore, and *bona fide* purchasers from the defendant, the lien was lost.—Code, § 2457.

4. It is true that attorneys cannot prejudice their clients by unauthorized acts; but, if an entire term passes without an *alias fi. fa.*, by such acts, the lien thereby determines, as to third persons. The consequences of such acts are matters to be settled between the attorneys and their clients.

5. Construing the record most strongly against appellant, it does not appear that the claimant consented to more than the first postponement, and not to that except, perhaps, by the inference of the attorneys. Nor does it appear that he was benefited by said postponement; but, on the other hand, that the plaintiffs were largely benefited by the additional security which they received. It would be harsh and unjust, to presume that the postponement was sought by the claimant, with special reference to a subsequent mortgage.

WALKER, J. The attorneys at law of the plaintiffs in execution twice directed a postponement by the sheriff of the sale of personal property levied on, and ordered that the property should remain with the defendant, and that he should not be required to give a delivery bond. Those two postponements extended from December to the next July. Immediately after the expiration of the two periods of delay above named, a *venditioni exponas* issued, and the sheriff was directed to postpone the sale under it for about six months. At the termination of this last delay, a second *venditioni exponas* issued, and the plaintiffs' attorneys ordered the sheriff to delay the sale for nearly two months. We think that the lien resulting from the delivery of the plaintiffs' execution, or from its levy, was lost by the several postponements of the sales under the execution and writs of *venditioni exponas*, by order of the plaintiffs' attorneys.—Patton v. Hayter, Johnson & Co., 15 Ala. 18; Br. Bk. at Montgomery v. Broughton & Duprey, 15 Ala. 132; Wood v. Gary, 5 Ala. 43; Campbell v. Spence, 4 Ala. 551; Leach v. Williams, 8 *ib.* 764; Berry v. Smith, 8 Washington's C. C. R. 60.

The authorities, which are above cited, settle the law in this State, as to the effect of the delays directed by plaintiffs' attorneys, in defeating the liens of the execution, in favor of junior execution creditors. There can be no reason for a discrimination between a junior execution creditor, and one who holds under a mortgage, such as that of the claimant in this case.—Berry v. Smith, *supra*. The lien of the mortgage having attached pending the constructively fraudulent delays, the execution creditor who directed those delays must be postponed for it.

It may be conceded, without affecting the result, that the claimant, by his consent to the first postponement of the sale under the execution, is estopped from saying that such delay is constructively fraudulent. The second order for a forbearance to sell under the execution, and the orders for the postponement of the sale under the two writs of *venditioni exponas*, together with the fact that the delays thus ordered extended through a period of about eight months, during all which time the property was, by special direction, permitted to remain with the defendant in execution, without bond, are abundantly sufficient, of themselves, to defeat the plaintiffs' lien, in favor of the claimant; and to none of these last acts did the claimant's assent extend.

It is contended for the appellants, that an attorney, as such, has no authority to direct the delay of sale, after a levy of his client's execution. It must be conceded that that position is sustained by many authorities, both English and American.—Banks v. Evans, 10 Smedes & Marshall, 58; Doe v. Ingersoll, 11 *ib.* 273; Union Bk. of Tenn. v. Gavan, 10 *ib.* 344; Dunn v. Newman, 7 Howard's Miss. 582; 1 Comyn's Digest, "Attorney," (B. 10.) The decisions are not altogether consistent; and most of them rest upon the idea that an attorney's authority ceases with the rendition of the judgment. In most of the cases, it is conceded that the attorney may receipt for the money due on a judgment; and it has been held, in England, that he might acknowledge satisfaction, although he had received nothing.—Comyn's Digest, *supra*; Wycoff v. Bergen, Coxe's (N. J.) R. 214.

In this State, there is a plain manifestation of the legislative intent, that the authority of the attorney shall continue after the rendition of judgment. The statutes from which that intent is inferred, are those which provide that the sheriff may give notice of the requirement of an indemnifying bond, when the defendant's title to the property levied on is doubtful, to the plaintiff's attorney; that an officer, who has made money upon an execution, shall give notice, within ten days, to the plaintiff, or *his attorney*, if resident in the county; that the *plaintiff*, or *his attorney*, may make the affidavit on which a garnishment issues after judgment; and that for a failure to pay over money, on demand of the *plaintiff's attorney*, the

sheriff subjects himself to a rule.—Clay's Digest, 210, § 50; Code, §§ 2444, 2451, 2471, 2472, 3602.

The denial of the attorney's authority after the rendition of the judgment, would do violence to the statutes referred to. They evidently contemplate, that the attorney is to exercise a general superintendence over the process issued to enforce the payment of the judgment, which he has obtained for his client. The notification by the sheriff, that a bond of indemnity is required, has the effect of signifying to the party that the levy will be abandoned, unless the indemnity is given. Why permit such a notification to be given to the attorney, if he does not represent the plaintiff, in directing the proceedings under the execution? A similar question might be significantly asked, in reference to each one of the other particulars in which the attorney's authority is recognized by the statutes.

This court, in its previous decisions, has, in effect, asserted the authority of the attorney over the proceedings for the collection of a judgment. In *McClure v. Colclough*, 5 Ala. 65, it was decided, that the sheriff was protected from liability, for the omission to return an execution at the time appointed by law, by the fact that he acted under the order of the plaintiff's attorney. If the attorney had no authority to stay the sale in this case, it would follow that the sheriff would be liable for the omission to sell. It cannot be held that the sheriff would not be protected by the order of the attorney in this case, without disregarding the decision in *McClure v. Colclough*, *supra*; for it would be most unreasonable to say, that the attorney has authority to direct the sheriff not to return an execution, but is without authority to delay the sale under an execution. The decision in *McClure v. Colclough* is, we think, sustained in principle by *Walker v. Goodman & Mitchell*, 21 Ala. 647, and *Crenshaw v. Harrison*, 8 Ala. 342. See, also, *Kirksey v. Jones*, 7 Ala. 622; *Hope v. Oswitchee Company*, 5 Ala. 629.

Guided by the spirit of our statutes, and the previous decisions of this court, and by what we conceive a sound policy, we conclude, that the attorney's authority does not cease with the rendition of the judgment, but continues for the purpose of directing the proceedings under the process of the court,

for the collection of the judgment. This authority would be subject to revocation by the client, and could not override the control by the plaintiff himself of the proceedings under his judgment.

It results from what we have said, that the charge to the jury, upon the evidence, was properly given; and the judgment of the court below must therefore be affirmed.

Several other questions were argued by the counsel, which are not considered in this opinion, because the view which we have taken of the case is decisive of it.

THE HISTORY OF THE

... of the ... and ...

... of the ... and ...

INDEX.

ACTION.

1. *Conversion by administrator no cause of action against estate.*—When an administrator is sued in his representative character, for an alleged conversion of a slave by his intestate, proof of his possession and employment of the slave at the commencement of the suit does not authorize a recovery against him, since the estate is not responsible for his acts.—*Shorter v. Urquhart*. 360

ADEMPMENT OF LEGACIES.

See *WILLS*, 4, 5, 6.

ADJUDGED CASES.

1. *Settled rule of property binding on courts.*—This court does not feel at liberty to depart from a decision which has been recognized by subsequent cases, and which has probably been acted upon as a practical rule of property, although, if the question presented were an open one, a different conclusion might be attained.—*Field's Heirs v. Goldsby*. 218
2. *Binding effect of judicial decisions.*—In the construction of a warranty in this case, the court adhered to the construction placed on a similar warranty in *Duff v. Ivey*, 3 Stew. 140; and the decision was based, partly, on the fact that that decision had been acquiesced in for more than twenty-five years, and had probably been acted on as a rule of property in many instances.—*Livingston v. Arrington*. 424
3. *Conclusiveness of judicial decisions.*—When a case is brought to the appellate court a second time, the opinion previously pronounced, even though its correctness may be doubted, as to the precise question then before the court, is obligatory; but, while yielding implicit obedience to the actual decision, the court is not necessarily bound to carry out literally the *dicta* pertaining to questions which were not then presented on the record.—*Jesse v. Cater*. 475

AGENCY.

1. *Agent of municipal corporation not public agent.*—Where the charter of an incorporated town provides, that its corporate name shall be “the town of E.”, and that all its corporate powers shall be vested in, and exercised by and through, an intendant and certain councillors, who shall constitute a board to be called “the intendant and council of the town of E.”; the persons composing the board are but the directors and agents of the corporation, and in making contracts under color of their authority as such agents, they are not to be considered as public or government agents, contracting in behalf of the public.—*Hall v. Cockrell*..... 507
2. *When covenant of agent does not bind principal.*—By a contract under seal, between plaintiff of the first part, and “the intendant and council of the town of E.”, who were the executive board of the corporation styled “the town of E.”, of the second part, plaintiff covenanted to perform certain services in repairing the streets of said town, “in consideration of which said services, the parties of the second part” agreed to pay him a stipulated sum of money; and “the said parties” signed their individual names, and affixed their seals to the contract: *Held*, that the instrument was not the deed of the corporation..... 507
3. *When agent is liable individually on his covenant.*—Where an agent signs and fixes his name and seal to a covenant, which, although he describes himself as agent, contains apt words to charge him personally, and which is not binding as the deed of his principal, he is personally responsible on it, and the superadded words are a mere *descriptio personæ*..... 507
4. *Slave may be agent.*—A slave may act as the agent of his owner or hirer.—*Stanley v. Nelson*..... 514
5. *Liability of principal for money wrongfully received by agent.*—Although an agent is liable personally for money received by him, by authority of his principal, belonging to another; yet the principal also is liable, whether the money is paid over to him or not.—*Cook v. Cook*..... 660
6. *Ratification of attorney's unauthorized employment.*—Conceding that an attorney at law has no authority to employ another attorney to act for his client, yet if he soon afterwards informs his client of such unauthorized employment, and the latter does not dissent from it, these facts are proper to be submitted to the jury, in an action brought by the second attorney to recover his fees, to enable them to determine whether the client did not assent to the employment.—*King v. Pope*..... 602

ALIMONY.

See DIVORCE, 8.

AMENDMENTS.

1. *Amendment of petition for supersedeas allowable.*—A petition for *supersedeas*, which, under our practice, stands in lieu of a declaration, may be amended, by leave of the court, after demurrer sustained to the original, provided the amendment does not make an entirely different case as to the execution sought to be superseded.—*Pearsall v. McCartney*. 110

AMENDMENTS—CONTINUED.

2. *Amendment of judgment nunc pro tunc*.—A recital in a judgment *nunc pro tunc*, that sufficient matter to authorize its rendition was disclosed to the court "by sufficient, competent, and satisfactory evidence," will sustain the judgment, if the parties appear to the motion, and do not show, either by bill of exceptions or in some other appropriate manner, that the recital is untrue.—*Price & Simpson v. Gillespie*... 279
3. *Amendment of record on allegation of fraud*.—The general rule, which requires some matter of record, entry, or memorandum in the handwriting of the judge, to authorize an amendment of the record *nunc pro tunc*, does not apply to cases in which the entry is impeached for fraud; and though these cases generally arise collaterally, yet an entry relating to a grant of letters of administration may be amended on a direct application, of which the opposite party must have notice, setting forth the fraud specifically, and making the necessary proof.—*Dunham v. Roberts*..... 286
4. *Allegation of fraud must be specific*.—If the motion simply states, as the ground for the amendment asked, that the record states a fact which was not proved, that as it stands it operates a fraud on the rights of the plaintiff in the motion, and that it is void in law, on account of fraud in a legal sense, the allegation is not sufficiently specific to authorize the introduction of parol evidence to prove that the fact recited was not true..... 286
5. *Amendment of complaint by change of plaintiffs*.—Where an action of trover is brought in the name of the assignor, for the use of the assignee for the benefit of creditors, and the evidence shows that the conversion took place after the assignment, the complaint cannot be amended so as to authorize a recovery.—*Stodder v. Grant & Nickels*..... 416
6. *Amendment of bill in chancery*.—In reversing a decree for the specific performance of a parol contract, on account of a fatal variance between the pleadings and proof, although the evidence shows that the complainant has a good cause of action, the appellate court will not remand the cause, in order that the bill may be amended, if the amendment required would make a new case; but will dismiss the bill, without prejudice to the right to file another.—*Williams v. Barnes*..... 613

APPEALS.

1. *From judgment of conviction under bastardy act*.—*Form of security for costs*.—From a judgment of the circuit court, in a proceeding under the bastardy act, an appeal may be taken (Code, § 3821) by merely giving security for the costs; and the security may be either a bond, or a simple acknowledgment in writing.—*Satterwhite v. The State*..... 65
2. *Sufficiency of appeal bond as security for costs*.—When an appeal bond is designed to operate merely as security for the costs, and not to supersede the judgment, although a misdescription of the judgment would be fatal, yet a mere omission to recite in the bond the several days on which the judgment required the respective sums to be paid would not have that effect, if the judgment were otherwise correctly described, by its aggregate amount, names of parties, term of the court when rendered, &c.; such an omission may be supplied by a comparison of the bond with the clerk's certificate, or with other parts of the record..... 65

APPEALS—CONTINUED.

3. *Appeal lies from final decree of distribution, on proceedings instituted by personal representative.*—An appeal lies from a final decree of the probate court, confirming the report of commissioners appointed to make a division of the slaves belonging to an estate among the persons entitled under the will, although the proceedings were instituted by the personal representative, and not by a legatee or distributee.—Code, § 1888, ¶ 4. *May's Heirs v. May's Adm'r.* 141
4. *Remandment of cause on reversal of decree.*—On a reversal of the decree of the probate court, disallowing the probate of a will, the cause having been heard before the judge without the intervention of a jury, although the appellate court might (Code, § 3034) render the decree which the probate court ought to have rendered, the safer practice is to remand the cause.—*Wells v. Bransford.* 200
5. *Joinder in error waives defects in appeal.*—A joinder in error is a waiver of the appeal, bond, or security for costs, and of all defects therein, and a motion to dismiss the appeal afterwards comes too late. (*Rice, C. J., dissenting.*)—*Thompson v. Lea.* 453
6. *Judgment corrected and affirmed.*—Where the affidavit for the garnishment is made by the real owner of the judgment of which satisfaction is sought, and judgment is rendered in his name against the garnishee, while the affidavit and garnishment correctly describe the original judgment, the judgment will be corrected in the appellate court, at the costs of the appellant, and rendered in the name of the plaintiff in the original judgment. 488
7. *Proper parties to appeal.*—An appeal from a joint judgment against several defendants, though sued out by one of the defendants, must be in the names of all; but it is not necessary that the appeal bond should, in so many words, recite that fact, if, upon a fair construction of its language, it shows that the whole case is brought up.—*Deslonde & James v. Carter.* 541
8. *Sufficiency of appeal bond.*—A joint judgment having been rendered against D. and J., the two proponents of a will, D. alone sued out an appeal; and the condition of the appeal bond was as follows: "Whereas the above bound D. hath applied for and obtained an appeal, in a certain suit heretofore pending and determined", &c., "in which the said C. and E. [obligees] are defendants, and said D. and J. are plaintiffs, in the matter of the contest of the will of J. D., deceased, returnable", &c.: "Now, if the said D. shall prosecute said appeal to effect, and pay and satisfy the judgment which shall be rendered in said cause", &c. *Held,* that the bond was sufficient. 541
9. *Limitation of appeal.*—On motion to dismiss the appeal in this case, because it was not taken within six months after the rendition of the decree, (Code, §§ 1888, 2039,) the court said, that the question was one of difficulty and importance, and declined to consider it, because its decision could not affect the result of the case.—*Williams v. Gunter.* 682
10. *Appeal bond insufficient, which misdescribes judgment.*—If the appeal bond misdescribes the judgment, as where the judgment is against the appellant and another, and the bond describes a judgment against the appellant only, the appeal will be dismissed on motion.—*Dumas v. Hunter.* 688

APPEALS—CONTINUED.

11. *Transcript not filed in time.*—The appeal in this case was dismissed, on motion, because the transcript was not filed until the third term after the appeal was taken.—*Owens v. Echols*..... 689
12. *Bond, or security for costs, necessary to constitute valid appeal.*—A valid appeal cannot be taken, without giving bond, or security for costs, within the period prescribed by the statute of limitations governing appeals; when application is made for an appeal within the prescribed period, but no bond, or security for costs, is given until after its expiration, the appeal will be dismissed on motion.—*Mays v. King*,..... 690

ARBITRATION AND AWARD.

1. *Submission to arbitration construed.*—Pending an injunction suit for the abatement of a livery-stable, the parties agreed to submit to arbitration the matters in controversy between them, and the agreement contained a stipulation "that the award of the arbitrators, made in pursuance of this agreement, shall terminate and forever decide all matters of controversy, at law or in equity, in relation to the said livery-stable": *Held*, that the right of action at law on the injunction bond, though it might not be included in the subject-matter to be directly decided by the arbitrators, was nevertheless to be settled by the award; and that, consequently, after the award was made, an action at law could not be maintained on the injunction bond, unless the award was not binding. *Jesse v. Cater*..... 475
2. *Plea averring arbitration and award.*—In an action on an injunction bond where the matters in controversy in the injunction suit were submitted to arbitration, and the arbitrators awarded that certain acts should be done by the parties concurrently, a plea setting up the submission and award must aver performance on the part of the pleader, or an offer to perform, or a good and legal excuse for the omission to do either. 475
3. *Award construed.*—In awarding an exchange of lots, the arbitrators directed that the parties "can and do make" to each other respectively "a fee-simple title": *Held*, that the conveyances were to be executed concurrently; that a "fee-simple title" meant a good title; that the award did not ascertain that the defendant then had the title to the lot which he was to convey, but that he could procure it; and that his failure to procure the title was a good and legal excuse for the plaintiff's failure to perform..... 475
4. *Estopped by submission and award.*—Where a submission to arbitration is made under an order of court, and the award entered up as the judgment of the court, a party is not thereby estopped from pleading any matter not necessarily within the scope of the award..... 475

ARSON.

See CRIMINAL LAW, 16, 17, 18, 19.

ASSAULT.

See CRIMINAL LAW, 13, 14.

ASSAULT WITH INTENT TO MURDER.

See CRIMINAL LAW, 31, 32, 33, 34.

ASSUMPSIT.

1. *Admissibility of evidence of plaintiff's general good character.*—Where plaintiff and defendant are both examined as witnesses under the statute, in assumpsit on the common counts for services rendered, and contradict each other in some particulars, and the defendant then introduces a witness who testifies to conversations of the plaintiff which, in some particulars, contradict her testimony on the trial, the plaintiff cannot be allowed to prove her good character, by the declarations of the defendant, or in any other manner.—*Owens v. White*..... 413
2. *When assumpsit for money had and received does not lie.*—Assumpsit on the common counts cannot be maintained to recover money received by the defendant from an insurance company, under a policy effected by him, in his own name, on certain property some of which belonged to the plaintiffs, when the money was not received, either in whole or in part, on account of plaintiff's property, and their property was not in fact covered by the policy.—*Turner v. Stetts, Allen & Gill*..... 420
3. *Statute of limitations.*—Where a party has the right to bring either trover for the conversion of his slave, or assumpsit for the proceeds of sale, and elects to proceed in the latter action, the statute of limitations begins to run from the time that cause of action accrued, and the fact that the other remedy is barred does not defeat the action.—*Ivey's Adm'r v. Owens and Wife*..... 641

ATTACHMENT AND GARNISHMENT.

1. *Who may make affidavit for garnishment.*—Under section 2520 of the Code, which allows a judgment creditor of a distributee to sue out process of garnishment against the administrator of the estate, the affidavit for the garnishment should be made by the real owner of the judgment, and not by the plaintiff of record.—*Jackson v. Shipman*..... 488
2. *In whose name garnishment must be prosecuted.*—But, although the affidavit should be made by the real owner of the judgment, and although the garnishment is the institution of a suit, yet the process must be sued out, and the judgment on the answer taken, in the name of the plaintiff of record, and not in the name of the real owner of the judgment..... 488
3. *What defenses garnishee may make.*—The garnishee cannot raise the question of the ownership of the original judgment, since he has no interest in that question. Conceding that he may show satisfaction of the original judgment, and that his statement of that fact, when not controverted or disproved, must be taken as true; yet his mere statement "that he is advised and believes" that the judgment has been satisfied, is not an averment that such fact exists..... 488
4. *As to proof of original judgment.*—It is erroneous to render judgment against the garnishee, without proof of the original judgment; yet, where the judgment is correctly described in the garnishment, to which the garnishee made answer, and the judgment entry shows that the garnishee appeared in court, "and waived the objection that no judgment could be rendered because no execution could issue on the judgment,"—this is an admission of the existence of the original judgment, and dispenses with further proof of it..... 488

ATTACHMENT AND GARNISHMENT—CONTINUED.

5. *Judgment corrected and affirmed.*—Where the affidavit for the garnishment is made by the real owner of the judgment of which satisfaction is sought, and judgment is rendered in his name against the garnishee, while the affidavit and garnishment correctly describe the original judgment, the judgment will be corrected in the appellate court, at the costs of the appellant, and rendered in the name of the plaintiff in the original judgment. 488

ATTORNEYS-AT-LAW.

1. *Judicial admissions of attorney, conclusiveness of.*—Conceding that attorneys-at-law have power to bind their clients by written admissions as to the facts of a case; yet, where such admissions are made improvidently, or through mistake, the court may relieve against them, by means of its coercive powers over its own officers, and may set them aside upon such terms as will meet the justice of the particular case. *Harvey and Wife v. Thorpe.* 250
2. *Ratification of attorney's unauthorized employment.*—Conceding that an attorney-at-law has no authority to employ another attorney to act for his client, yet, if he soon afterwards informs his client of such unauthorized employment, and the latter does not dissent from it, these facts are proper to be submitted to the jury, in an action brought by the second attorney to recover his fees, to enable them to determine whether the client did not assent to the employment.—*King v. Pope.* 502
3. *Attorney's authority after judgment.*—An attorney's authority does not cease with the rendition of the judgment, but continues for the purpose of controlling the process for its collection; and hence the lien of an execution may be lost, by the attorney's order to the sheriff, without instructions from his client, to postpone the sale of property levied on, and to allow the property to remain in the possession of the defendant in execution.—*Albertson, Douglass & Co. v. Goldsby.* 711

BAIL.

1. *Bail in capital cases.*—Under the provisions of the constitution (Art. I, § 17) and laws (Code, § 3669-79), a person indicted for murder is entitled to bail, as a matter of right, unless the court to which the application is made is of opinion, on the evidence adduced, that he is guilty of murder in the first degree; and if the application for bail is made to a circuit judge, and is by him refused, the evidence in the case may be set out on exceptions (Code, § 3673), and application made thereon to the supreme court.—*Ex parte Banks.* 89
2. *Murder in the first degree not here shown.*—Upon the evidence set out in the bill of exceptions (for which in full see statement of the case), the defendant was held entitled to bail as a matter of right, because the court could not, upon that evidence, say that he was guilty of murder in the first degree, as defined by section 3080 of the Code. 89
3. *Amount of bail.*—That the defendant is a man of fortune is a fact which may well be considered in fixing the amount of his bail. 89

BANKRUPTCY.

1. *Bankrupt act, second section, construed.*—Under the second section of the bankrupt law, (U. S. Statutes at large, vol. 5, p. 440,) approved August 19th, 1841, the execution by a voluntary bankrupt, after the 1st January, 1841, of a deed of trust giving a preference to some of his creditors, does not invalidate his discharge in bankruptcy, unless the act was "done in contemplation of the passage of a bankrupt law."—*Pearsall v. McCartney*..... 110
2. *Evidence of bankrupt's general good character inadmissible.*—When a bankrupt's certificate of discharge is impeached for fraud, evidence of his general good character is not admissible for him..... 110

BASTARDY.

1. *Form of security for costs.*—From a judgment of the circuit court, in a proceeding under the bastardy act, an appeal may be taken (Code, § 3821) by merely giving security for the costs; and the security may be either a bond, or a simple acknowledgment in writing.—*Satterwhite v. The State*..... 65
2. *Sufficiency of evidence to authorize conviction.*—It is not error to refuse to instruct the jury, at the defendant's request, "that they ought to acquit unless the proof showed beyond a reasonable doubt, that he was guilty"; but it is erroneous to instruct them, "that, if the State produced a preponderance of evidence, they might upon such preponderance of proof find the defendant guilty."..... 65
3. *Examination of parties as witnesses.*—Where the mother and the putative father of the child, both being made witnesses by the statute (Code, § 3807), are examined on the trial, their testimony must be weighed by the jury like that of other witnesses..... 65

BEQUESTS.

See WILLS, 12.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Order payable out of particular fund, when collected, not bill of exchange.*—A written order, requesting the person to whom it is addressed to pay a specified sum out of the proceeds of a certain judgment, when collected, is not a bill of exchange.—*Glidden v. McKinstry*..... 408
2. *Consideration of acceptance of such order may be proved, and how.* The acceptor of such an order, when sued for negligence in collecting and failure to pay when collected, may prove the consideration on which his acceptance was based; and for this purpose may show that the money collected on the judgment was paid to other persons who had prior claims on the fund, and that the balance was not collected.. 408
3. *Bill of exchange drawn by executor no claim against estate.*—A bill drawn by G. S., with the addition of the words "executor of S. S.", is the personal contract of the drawer, and does not bind the estate; and an accommodation acceptor, who pays the bill, has no claim against the estate.—*Kirkman, Abernathy & Hanna v. Benham*..... 501

BILLS OF EXCHANGE AND PROMISSORY NOTES—CONTINUED.

4. *Equitable set-off against assignee of bond.*—If a note under seal is assigned by endorsement after maturity, the assignee takes it subject to all equitable defenses existing in favor of the maker prior to notice of the assignment, whether they grow out of the same, or out of a different transaction. (WALKER, J., *dissenting*, held that, where the assignee acquired the legal title by endorsement, without notice of the maker's equity, he ought to be protected.)—Carroll v. Malone..... 521
5. *Assignment of note chargeable on wife's separate estate.*—A promissory note, which was executed under such circumstances as to constitute it a charge upon the separate estate of a married woman, may be enforced in equity by a transferee or endorsee against her estate.—Baker v. Gregory and Wife 544
6. *Bill of exchange, accommodation endorsement of.*—If a bill of exchange, which is endorsed for the accommodation of the acceptor, for the special purpose of enabling him to obtain an extension of a debt in bank, is transferred by him as collateral security for the payment of another pre-existing debt, the creditor takes it with implied notice of the fact and purpose of the accommodation endorsement, and subject to any defense which would be available against the acceptor himself.—McKenzie v. Br. Bk. Montgomery 606
7. *Legal defense to note no ground of equitable jurisdiction.*—Where a note, given for the purchase money of town lots, at a place which was the contemplated terminus of a railroad then in process of construction, was made payable "when the first locomotive engine on the M. railroad should arrive" at the town, the fact that the railroad company was sold out, and the road completed by another company subsequently incorporated, is available (if at all) as a defense at law, and therefore constitutes no ground for a resort to equity.—Askew v. Hooper..... 634
8. *Estoppel in pais against setting up defense to note.*—If the maker of a promissory note induces a third person to trade for it, by assuring him that he has no set-off against it, and that he will pay it promptly, he cannot afterwards assert any ground of relief against the purchaser.—Drake v. Foster..... 649

BOUNDARIES.

1. *Boundaries of land how determined.*—Streets which are well defined and designated by some natural or artificial monument, must govern course and distance in fixing the boundaries of lands; but streets which, in the infancy of a city or town, are only undefined portions of land dedicated to public use, themselves requiring to be located, would furnish very uncertain guides in arriving at the boundaries of other lands.—Doe d. Saltonstall and Wife v. Riley and Dawson..... 164

CASE, ACTION ON THE.

1. *Admissibility of defendant's declarations.*—In an action on the case, to recover damages for injuries done to plaintiff's hogs, by defendant's children and servants, while driving them out of his field, the defendant's declaration, "that plaintiff's hogs were in the habit of running in his field, and that they should not do it any more", is admissible

CASE, ACTION ON THE—CONTINUED.

- evidence for plaintiff, because it tends, though remotely, to show that the hogs which were injured belonged to plaintiff.—*Smith v. Causey*... 655
2. *Evidence confined to matters in issue.*—If the declaration alleges that the injuries complained of were done by defendant's children and servants, plaintiff cannot be allowed to prove injuries done by the defendant himself in person; and defendant's threats that he would kill the hogs are therefore inadmissible, because they tend to show that he did kill them..... 655
3. *What authorizes recovery by plaintiff.*—To authorize a recovery by plaintiff, in such an action, it is not necessary to prove that the particular act complained of, if done by defendant's children and servants in the performance of their duty and service, was commanded by the defendant; nor that the defendant's dogs were vicious, and that he knew it; nor that the injury was done entirely by the defendant's dogs..... 655
4. *Unnecessary averment, if descriptive, must be proved.*—If the declaration alleges that the injury was done with the defendant's dogs, the averment, though unnecessary, cannot be disregarded, since it is descriptive of the cause of action..... 655

CHANCERY.

1. *Resulting trust founded on presumed intention, and not raised between parent and child.*—The resulting trust which, in equity, arises in favor of the person who advances the purchase money of land, is founded upon presumptive intention, and is designed to carry that intention into effect. It will not be created in opposition to the declaration of the person who advances the money, nor in opposition to the obvious purpose and design of the transaction. The mere fact that the purchase money was advanced by a parent, while the conveyance was taken in the name of a child, who is not shown to be provided for, is not sufficient to raise the presumption of such a trust.—*Hatton v. Landman*..... 127
2. *Evidence in this case held insufficient.*—Bill filed by two sisters, against widow and devisee of deceased brother, to establish resulting trust in lands purchased by decedent in his own name, but paid for with money advanced by his mother. The complainants were all of lawful age when the purchase was made; the bill was not filed until after the expiration of more than sixteen years from the purchase, more than nine years after the death of the old lady, and more than three years after the death of the son; and the only excuse alleged for the delay was disproved. The complainants' evidence consisted principally of the old lady's declarations, made in her son's presence, that her money had paid for the land; the son's admissions of that fact; and his promise to his mother that he would "do what was right between his sisters, after she was gone, in relation to the land." The other evidence in the cause showed that the son lived with his mother, and managed her business, for six or seven years before the purchase was made, and from that time until her death; that his services to her, for which he was not shown to have received any compensation, were worth more than

CHANCERY—CONTINUED.

- the price of the land; that he was an economical and industrious man; and that his mother knew, several years before her death, that he claimed the land as his own. The court refused to establish the trust; holding that the declarations of the parties were reconcilable with the non-existence of the trust, or with its waiver and discharge before the old lady's death, and that the evidence, under all the circumstances of the case, was not sufficient. 127
3. *Jurisdiction in cases of fraud and mistake, where remedy at law is adequate and complete.*—Equity will not entertain jurisdiction of a bill, the sole object of which is to recover money alleged to have been paid through ignorance or mistake of fact on the part of the complainant, and through fraudulent pretenses on the part of the defendant, where the remedy at law is adequate and complete.—*Russell v. Little*. 160
4. *Settlement of trustee set aside on objection by beneficiaries.*—If a trustee sells the trust property under a power of attorney from the wife, applies the proceeds of sale, with her consent, to the payment of the debts on which he was bound as surety, obtains her receipt showing that the proceeds had been applied for her support, and uses it as a voucher on the settlement of his trusteeship,—equity will not recognize such an execution of the trust, but will set aside the settlement on the application of the beneficiaries; and the trustee will be held estopped from insisting that the proceeds were applied as the court, on a proper application, would have directed.—*Henderson v. Segars*. 352
5. *Jurisdiction to decree division of slaves belonging to decedents' estates.*—A widow, or other distributee of an estate, who retains possession of slaves on the ground of an attachment to them as family negroes, cannot come into equity to enjoin an action at law by the personal representative for their recovery, and to have them allotted to her as a part of her distributive share; the statute law having provided another forum to make a division in such case.—*Machem v. Machem*. 374
6. *Reformation of will.*—A will cannot be reformed in equity, so as to make it create a separate estate in a married woman, on proof of an agreement, prior to her marriage, between the testator, who was her father, and her intended husband, that the will of the former should exclude the husband's marital rights. 374
7. *Jurisdiction where remedy at law is adequate and complete.*—A widow cannot come into equity, to enjoin an action at law by the personal representative of her husband, for the recovery of slaves which were bequeathed to her, and which her husband never reduced to possession, as husband, in his lifetime: her remedy at law is adequate and complete. 374
8. *Rescission of contract by vendee.*—The purchaser of land, so long as the contract remains executory, has a right to demand a good title; but, after accepting a conveyance, the maxim *caveat emptor* applies with the utmost rigor, and he cannot, in the absence of fraud or mistake, rescind the contract in equity, and enjoin a judgment for the purchase money, as on an executory contract.—*Thompson's Adm'r v. Christian*. 399
9. *Facts showing acceptance of conveyance.*—Where the vendee filed his bill to rescind the contract, and to enjoin a judgment for the purchase money, as on an executory contract, it was held that the pleadings and proof

CHANCERY—CONTINUED.

- showed that he had accepted a conveyance, because, 1st, it was unreasonable to suppose that, after exhibiting the caution shown by other facts connected with the purchase, he would have rested for so long a period (three years) after discovering his vendor's want of title, without any written evidence of his purchase, when the agreement was that a conveyance "was to be executed in a very short time"; 2d, the bill did not allege, positively and explicitly, that he never accepted a deed, but only averred that the vendor "never complied with his promise in relation to the title to said land", and that complainant "has no deed to said land"; 3d, he executed a mortgage on the land, of even date with the notes given for the purchase money, to secure the payment of the notes, and recited therein that a deed had been executed to him; and, 4th, the register reported, on a reference, that he had constructive possession of the land by reason of the conveyance to him. 399
10. *Laches in seeking rescission of contract fatal to relief.*—A party who seeks the rescission of a contract, on the ground of fraud, must move within a reasonable time after the discovery of the fraud. What is a reasonable time must depend on the circumstances of each particular case. Here, a rescission was refused, because the infant, after attaining his majority, and with knowledge of the fraud, accepted from his guardian a deed for the land, remained in possession more than seven years after the sale, and more than five years after the discovery of the fraud, and showed no excuse for his delay.—*Kern v. Burnham*. 428
11. *Removal of husband as trustee.*—Where the wife files a bill against her husband to compel the specific execution of an agreement to make a settlement on her, and does not allege that she is separated from him on account of his improper conduct, or that he intends to remove from the State without her, or that she has reasons to apprehend a denial of her right to the property settled on her by the court, or that his habits are such as render him incapable of or unfit for the discreet and proper management of the estate, the court will not appoint another trustee in his stead, nor forbid his interference with the property.—*Andrews v. Andrews*. 432
12. *Constructive trust.*—An executor, while keeping his testator's estate together under the directions of the will, drew his bill of exchange, in favor of one D., which was accepted for accommodation by K. A. & H., and then discounted in bank. The executor applied a small part of the proceeds to the discharge of debts of the estate, and loaned the residue to said D., as money belonging to the estate. D. afterwards confessed judgment, in favor of the executor, for the amount of his indebtedness to the estate, including this sum, and became insolvent. The executor also became insolvent, and removed from the State. A succeeding administrator collected a portion of the judgment, not exceeding the amount of the debt due the estate; and the acceptors, after paying the bill, filed their bill in equity against him, claiming the right to share in the sum collected. *Held*, that the bill contained no equity.—*Kirkman, Abernathy & Hanna v. Benham*. 501
13. *Equitable set-off.*—If a note under seal is assigned by endorsement after maturity, the assignee takes it subject to all equitable defenses existing

CHANCERY—CONTINUED.

- in favor of the maker prior to notice of the assignment, whether they grow out of the same, or out of a different transaction. (WALKER, J., *dissenting*, held that, where the assignee acquired the legal title by endorsement, without notice of the maker's equity, he ought to be protected.)—Carroll v. Malone..... 521
14. *Decree of divorce on account of insanity unnecessary yet proper.*—If a marriage is void by reason of the insanity of either one of the contracting parties, no decree of divorce is necessary to restore the parties to their original rights; yet a decree of divorce, in such case, is conducive to good order and decorum, and to the peace and conscience of the party seeking it.—Rawdon v. Rawdon..... 565
15. *Jurisdiction to remove cloud on title.*—If the mortgagee obtains a decree of foreclosure against the personal representatives and devisees of the mortgagor, without making the heirs-at-law parties to the suit, and becomes the purchaser of the premises at the master's sale, this constitutes such a cloud on the title of the heirs, after they have set aside the probate of the will by bill in chancery, as authorizes them to ask the interposition of equity for its removal.—Hunt and Frowner v. Acre and Johnson..... 580
16. *Original and concurrent jurisdiction.*—The original jurisdiction of equity is not affected by legislative enactments, conferring jurisdiction on the courts of law, unless the statute contains prohibitory or restrictive words; but such enactments are held to confer concurrent remedies.—Waldron, Isley & Co. v. Simmons..... 629
17. *Section 602, defining jurisdiction of chancery courts, construed.*—Under section 602 of the Code, which defines the powers and jurisdiction of the chancery courts in this State, the first subdivision, which includes "all civil causes in which a plain and adequate remedy is not provided in the other judicial tribunals," is but the adoption of the pre-existing rule; the second and third subdivisions, which include cases founded on a gaming consideration, and cases to subject the equitable title to real estate to the payment of debts, are modifications, by way of enlargement, of the system of equity jurisprudence and jurisdiction which had been established in England prior to the American revolution; and the fourth subdivision, which includes "such other cases as may be provided for by law," embraces all cases which, at and before the adoption of the Code, were known to be within the jurisdiction of courts of equity, and are not embraced in the first three subdivisions..... 629
18. *Jurisdiction of equity to enforce payment of partnership debt out of estate of deceased partner.*—A court of equity had original jurisdiction to enforce the payment of a partnership debt out of the estate of a deceased partner, and that jurisdiction is not taken away by any provision of the Code of Alabama..... 629
19. *Statute of limitations, how applied in equity.*—The statute of limitations applicable to actions at law is not binding on the chancery court, in cases of exclusively equitable cognizance; but that court, besides refusing to interfere where there has been gross laches, or a long or unreasonable acquiescence in the assertion of adverse claims, often adopts, in cases to which the statute of limitations does not strictly

CHANCERY—CONTINUED.

- apply, a period within which its aid must be sought, similar to that prescribed in analogous cases at law.—*Askew v. Hooper*. 634
20. *Laches fatal to relief*.—A bill for the rescission of a contract of purchase, on the ground of the vendor's false representations, was filed thirteen or fourteen years after the discovery of the fraud, and, although it alleged that the complainant abandoned the land on the discovery of the fraud, showed no act on his part which would have precluded him from enforcing the specific execution of the contract, if a favorable fluctuation in the price of the land had made it his interest to do so; and the laches was held fatal to the relief, on demurrer for want of equity. 634
24. *Legal defense to note no ground of equitable jurisdiction*.—Where a note, given for the purchase money of town lots, at a place which was the contemplated terminus of a railroad then in process of construction, was made payable "when the first locomotive engine on the M. railroad should arrive" at the town, the fact that the railroad company was sold out, and the road completed by another company subsequently incorporated, is available (if at all) as a defense at law, and therefore constitutes no ground for a resort to equity. 634

See PLEADING AND PRACTICE IN CHANCERY.

CIRCUIT COURT.

1. *Jurisdiction of circuit court on appeal from justice's court*.—When the record shows that appellant, against whom a judgment had been rendered by a justice of the peace, having prayed an appeal to a jury under a special statute, afterwards appealed to the circuit court, gave bond for the appeal, appeared in that court, and pleaded to the statement filed against him, and that the cause, after several continuances and a mistrial, was finally tried by a jury, the objection cannot be raised for the first time on error, that the circuit court had no jurisdiction of the case, because there was no judgment in the justice's court at the time the appeal to the circuit court was taken.—*Gresham v. Tucker*. 611

CODE, CONSTRUCTION OF.

1. *Code construed with reference to previous judicial decisions*.—In the framing of the statutes embodied in the Code, the legislature must be presumed to have had in view the then existing laws, and the construction placed upon them by the judicial decisions; and where the provisions of the Code are substantially the same with the old law, the legislative sanction of the judicial construction which it had received may be inferred.—*Per Walker, J. Ex parte Banks*. 28
2. Section 3243, statute against gaming, construed.—*Sweeney v. The State*. 47
- Also, *Huffman v. The State*. 48
3. Section 2136, authorizing "wife and mother, after desertion by husband, to prosecute or defend suit in his name, construed in *Ex parte Cole*. 50
4. Section 3613, as to change of venue in criminal case, construed in *Ward v. The State*. 53

CODE, CONSTRUCTION OF—CONTINUED.

5. Section 3254, concerning *lotteries*, construed in *Salomon and Boullemet v. The State*..... 83
6. Section 1888, concerning *appeals from decrees of division of estates*, construed in *May's Heirs v. May's Adm'r*..... 141
7. Section 2318, concerning *deposition of sole witness*, construed in same case, 141
8. Section 12, as to "*proceedings*" in actions governed by old law, construed in *Godden v. Le Grand*..... 158
9. Same section construed in *Daily v. Burke*..... 328
10. Section 1887, imposing costs for failure to present claims to executor, construed in *Wallace v. Nelson*..... 282
11. Section 1966, respecting *confessions of parties in suits for divorce*, construed in *King v. King*..... 315
12. Section 2456, as to *lien of judgments*, construed in *Daily v. Burke*.... 328
13. Sections 2407—2417, authorizing *rehearing after final judgment* in action at law, construed in *Pratt & McKenzie v. Keils & Sylvester*..... 390
14. Section 2403, authorizing *amendment of pleadings*, construed in *Stodder v. Grant & Nickels*..... 416
15. Section 2357, concerning *voluntary non-suits*, construed in *Palmer v. Bice*, 430
16. Section 1883, *statute of non-claims*, construed in *McHenry v. Wells*.... 451
17. *Constitutionality of Code*.—The constitutional provision (Art. III, § 23), that no bill shall have the force of a law until it be read on three several days in each house of the general assembly, does not require that everything which is to become a law by the adoption of the bill shall be thus read; nor does the provision (Art. III, § 1) prescribing the style of laws affect the validity of a body of laws, when the bill by which they were adopted pursued the prescribed form.—*Dew v. Cunningham*..... 466
18. Section 1990, concerning *distribution of wife's separate estate*, construed in *Willis v. Cadenhead*..... 472
19. Section 602, defining *jurisdiction of chancery courts*, construed in *Waldron, Isley & Co. v. Simmons*..... 629
20. Section 2142, as to *suits against partners*, construed in same case..... 629
21. Section 3047, regulating *sheriff's fees*, construed in *Mastin v. Cullom & Co*..... 670
22. Section 2298, making *entries on books of physician evidence for him*, construed in *Richardson v. Dorman's Executrix*..... 679

COMMON LAW.

1. *How far of force in this State*.—The common law of England, as changed and modified by our statutes, is part and parcel of the law of this State, so far as applicable to our institutions and government. *Barlow v. Lambert*..... 704

CONFLICT OF LAWS.

1. *Dissolubility of marriage contract*.—The English doctrine, that the dissolubility of the marriage contract depends upon the law of the country in which it was solemnized, is founded on the doctrine of perpetual allegiance, is therefore inconsistent with the spirit of our institutions, and is here repudiated.—*Thompson v. The State*..... 12

CONSTITUTIONAL LAW.

1. *Constitutional power of Congress to regulate commerce.*—The constitutional power vested in Congress to regulate commerce between the several States, necessarily includes the power to regulate navigation, as one of the means by which commerce is carried on, and, where the navigation extends into the interior, is not arrested by the intervention of State boundaries; but the grant of this power to Congress does not operate as an absolute prohibition on the States to legislate on the subject.—*Commissioners of Pilotage v. Steamboats Cuba, Swan, and J. H. Bell.* . . . 185
2. *Registration act not regulation of commerce.*—The act of February 15, 1854, "to provide for the registration of the names of steamboat owners," which requires a written statement of the names and residences of the owners of steamboats navigating the waters of this State to be filed in the probate court of Mobile, and imposes a penalty of \$500 for its violation, is not a regulation of commerce, within the constitutional grant of that power to Congress. . . . 185
3. *Nor in conflict with license laws of United States.*—The laws of the United States, regulating the coasting trade, do not confer rights, in the proper sense of that term, but rather impose restrictions on the trade; and the additional requisition of this State statute, as it does not obstruct or dispense with any of the requisitions of the acts of Congress, cannot be said to be in conflict with them. . . . 185
4. *Nor violative of ordinance of 1819, as imposing tax or duty.*—The requisition which this statute makes upon the owners of steamboats, is not a tax, duty, impost, or toll, within the ordinance of 1819, by which Alabama accepted the conditions of the act of Congress admitting her into the Union; and declared "that all navigable waters within this State shall forever remain public highways, free to the citizens of this State and of the United States, without any tax, duty, impost, or toll therefor, imposed by this State." . . . 185
5. *Constitutionality of Code.*—The constitutional provision (Art. III, § 23), that no bill shall have the force of a law until it be read on three several days in each house of the general assembly, does not require that everything which is to become a law by the adoption of the bill shall be thus read; nor does the provision (Art. III, § 1) prescribing the style of laws affect the validity of a body of laws, when the bill by which they were adopted pursued the prescribed form.—*Dew v. Cunningham.* . . . 466

CONTRACTS.

1. *Contracts construed by aid of surrounding circumstances.*—In the construction of a written contract, the court must place itself in the situation of the contracting parties at the time of its execution, and look at the occasion which gave rise to it, the relative position of the parties, and their obvious design as to the objects to be accomplished; but if the meaning and intention of the parties cannot be ascertained from the language of the instrument, when thus illustrated, it is void for uncertainty.—*Pollard v. Maddox.* . . . 321
2. *Bill of sale construed most strongly against maker.*—The salutary rule, that a written instrument, the language of which is of doubtful import, or

CONTRACTS—CONTINUED.

- capable of two constructions, must be construed most strongly against the maker, is applicable to bills of sale of slaves.—*Livingston v. Ar-
rington*, 424
3. *Contract founded on illegal consideration*.—A contract founded directly on an illegal consideration, whether the illegal act is in terms prohibited, or is only punished with a penalty, is void.—*Stanley v. Nelson*..... 514
4. *Contract made with slave while suffered to go at large*.—If a slave, while permitted by his owner or hirer, contrary to the provisions of the act of 1805 (Clay's Digest 541, § 12), to go at large, and to act as a free- man, makes a contract for the hire of another slave to work with him, and a white man gives his note under seal for the hire, the note is void. 514
5. *What consideration will support promise to pay by infant after coming of age*.— If a stranger, without obligation, expends his own funds in maintain- ing and educating an orphan child, who meanwhile becomes entitled to a large estate, out of which no allowance for her maintenance or education is applied for or made, this is a sufficient consideration to sup- port an express promise on her part, after coming of age, to repay him the amount so expended; and if such expenditure is made at the request of her brother-in-law, who thereby becomes liable for its amount, this liability on his part is a sufficient consideration to support an express promise on her part, after coming of age, to indemnify him against any loss he might thereby sustain.—*Baker v. Gregory and Wife*:..... 544
6. *Contract of wife having separate estate, effect of*.—Although the wife's prom- issory note, even when she has a separate estate, creates no personal liability on her; yet, if there is no restriction on her power to charge or dispose of it, she may charge her estate with the payment of her husband's debt, by any promise or contract which, if she were sole and unmarried, would bind her personally..... 544
7. *Liability of hirer of slave*.—If a slave runs away during the term of the hiring, and is committed to jail as a runaway, it is the duty of the hirer to pay the necessary jail fees; and if he refuses to do so, the owner, at the expiration of the term, may pay them, and thereby acquire a cause of action against him.—*Walker and Wife v. Smith*..... 560
8. *Promise made on Sunday does not avoid statute of limitations*.—A subsequent promise to pay a debt, whether express or implied, if made on Sunday, does not take the case out of the statute of limitations.—*Bumgardner v. Taylor*..... 687

For RESESSMENT OF CONTRACTS.

See CHANCERY, 8, 9, 10, 20.

See, also, SPECIFIC PERFORMANCE.

CORPORATIONS.

1. *Agent of municipal corporation not public agent*.—Where the charter of an incorporated town provides, that its corporate name shall be "the town of E.", and that all its corporate powers shall be vested in, and exercised by and through, an intendant and certain councillors, who shall constitute a board to be called "the intendant and council

CORPORATIONS—CONTINUED.

- of the town of B."; the persons composing the board are but the directors and agents of the corporation, and in making contracts under color of their authority as such agents, they are not to be considered as public, or government agents, contracting in behalf of the public. *Hall v. Cockrell*..... 507
2. *By-law of municipal corporation, in reference to sale of spirituous liquors, held void.*—The charter of an incorporated town gave power to its municipal authorities "to ordain all such ordinances and resolutions, and to make all such regulations, as may by them be deemed necessary for the control of the retailing of spirituous liquors within said town; to grant license for retailing of spirituous liquors within said town, upon such sum, to be paid therefor by each retailer, not to exceed \$2,000 *per annum*, as said intendant and council may order; to restrain and prohibit them, when deemed a nuisance; and, in general, to adopt such a system of police and municipal regulation, in regard to the traffic in ardent spirits, as shall be deemed by them most conducive to public order, morality and policy, in reference to the black or colored population:" *Held*, that the term "retailing," construed with reference to the general policy of the law in relation to the sale of ardent spirits, meant selling in small quantities; and that, though the charter authorized the entire prohibition of *retailing*, yet an ordinance which prohibited, under a penalty, the sale of spirituous liquors *in less quantities than twenty gallons*, without a license, was unauthorized and void.—*Harris v. Intendant, &c., of Livingston*..... 577

COSTS.

1. *Dismissal on motion of action brought by non-resident without giving security for costs.*—If an action is commenced in the circuit court, by or for the use of a non-resident, and security for the costs is not given previous to the issue of the summons, the defendant may have it dismissed on motion (Code, § 2395), although it is brought by plaintiff's wife (§ 2136) after being deserted by him.—*Ex parte Cole*..... 50
2. *Form of security for costs.*—From a judgment of the circuit court, in a proceeding under the bastardy act, an appeal may be taken (Code, § 3821) by merely giving security for the costs; and the security may be either a bond, or a simple acknowledgment in writing.—*Satterwhite v. The State*..... 65
3. *Sufficiency of appeal bond as security for costs.*—When an appeal bond is designed to operate merely as security for the costs, and not to supersede the judgment, although a misdescription of the judgment would be fatal, yet a mere omission to recite in the bond the several days on which the judgment required the respective sums to be paid would not have that effect, if the judgment were otherwise correctly described, by its aggregate amount, names of parties, term of the court when rendered, &c.; such an omission may be supplied by a comparison of the bond with the clerk's certificate, or with other parts of the record..... 65
4. *Construction of statute imposing costs on successful plaintiff, in action against executor or administrator, for failure to prove presentation of claim.*—Under the statute (Code, § 1887) which imposes the

COSTS—CONTINUED.

- costs on a successful plaintiff, in an action against an executor or administrator, commenced after the death of the testator or intestate, for a failure to prove a presentation of his demand, if the defendant intends to raise the question of presentation, he must present it on the record by plea or suggestion, so that the plaintiff may have an opportunity of proving the presentation, and the issue must be tried by the jury; but, if no such plea or suggestion is made, and the plaintiff has a general verdict on the issues joined, he is entitled to full costs.—*Wallace v. Nelson*..... 282
5. *Costs divided in chancery*.—The chancellor's decree in this case being reversed, and the bill dismissed, but without prejudice, on account of a variance between the allegations and proof, the costs were equally divided.—*Williams v. Barnes*..... 613

COURT AND JURY.

1. *Charge upon credibility and sufficiency of evidence held erroneous*.—Where a witness for the prosecution is impeached by proof of his contradictory declarations on a material point, it is error to instruct the jury, "that they must believe the witness of the State, unless they believe that the contradicting witness is entitled to more weight and credit than said witness for the State." Such a charge invades the province of the jury, who are the sole judges of the credibility and degree of credit to be accorded to each witness; and it is also objectionable, because the contradicting evidence, though less credible than the testimony of the witness for the State, may yet be sufficient to raise a reasonable doubt in the minds of the jury, and thus secure the defendant's acquittal.—*Corley v. The State*..... 22
2. *Charge dispensing with proof of venue, erroneous*.—Held, on the authority of *Brown's case*, 27 Ala. 47, that a charge which instructed the jury "that, if they believed the evidence, they must find the defendant guilty," when the bill of exceptions purported to state all the evidence, but did not show that the venue was proved, was erroneous.—*Huffman v. The State*..... 48
3. *Charge upon sufficiency of evidence in proceeding under bastardy act*.—It is not error to refuse to instruct the jury, at the defendant's request, "that they ought to acquit unless the proof showed beyond a reasonable doubt that he was guilty"; but it is erroneous to instruct them, "that, if the State produced a preponderance of evidence, they might upon such preponderance of proof find the defendant guilty."—*Satterwhite v. The State*..... 65
4. *Certainty necessary in instructions to jury*.—Instructions to the jury should be direct and certain: a charge which is involved and confused may properly be refused.—*Salomon and Boulemet v. The State*..... 83
5. *Charge held erroneous as tending to mislead the jury*.—A charge which assumes that an immaterial question of fact is an issue to be tried and determined by the jury, is well calculated to mislead them by withdrawing their minds from the true issues in the cause, and may for that reason be refused.—*Dunlap v. Robinson*..... 100
6. *Charge held erroneous, because either abstract, or contrary to evidence*.
A charge, as asked, held to have been properly refused, because, if the

COURT AND JURY—CONTINUED.

- fact assumed in it was true, the charge was abstract, and, if untrue, it did not conform to the evidence. 100
7. *What is abstract charge.*—A charge is not abstract, when there is any evidence, however weak, at all tending to support it.—*Hair v. Little.* 236
8. *Charge held erroneous, because invading province of jury.*—In charging the jury that they might give exemplary damages if the trespass was accompanied with circumstances of aggravation, the judge “playfully remarked, in the way of illustration, ‘such damages as would teach the old gentleman not to violate the Sabbath, nor injure his health by riding in the night, nor interfere with the rights of others’”: Held, that the instructions were erroneous, because the remarks were calculated to make the jury believe that the judge thought the facts justified heavy exemplary damages. 236
9. *Reversal on account of erroneous charge, notwithstanding deficiencies in plaintiff’s proof.*—Where plaintiffs claim under a deed of gift, which the court erroneously holds to confer no title on them, and therefore charges the jury that, on all the evidence, they are not entitled to recover, the judgment will be reversed at their instance, although the bill of exceptions, while purporting to set out all the evidence, does not show that they proved their identity with the donees named in the deed. *Elmore v. Mustin.* 399
10. *Abstract charge properly refused.*—A charge upon a question which is not shown, either by the pleadings or the bill of exceptions, to have been raised in the case, is abstract, and may be refused for that reason. *Gliddon v. McKinstry.* 408
11. *Charge upon evidence, when erroneous.*—A charge upon the effect of evidence, which is susceptible of a different construction from that placed on it by the court, is an invasion of the province of the jury, and therefore erroneous.—*Stanley v. Nelson.* 514
12. *Instructions to jury properly confined to matters in issue.*—Where issue is joined on a defective replication, the defendant cannot, by a request for instructions to the jury, claim the benefit of the plaintiff’s failure to prove a fact which, because not alleged in the replication, is outside of the issue.—*Nunn v. Mills.* 600
13. *Charge erroneous, as invading province of jury.*—A charge asked which denies to the jury the right or authority to draw any reasonable inferences from the facts stated in it, is properly refused.—*King v. Pope.* 602
14. *Charge assuming facts to be proved, erroneous.*—A charge which assumes that a certain fact is proved, when the evidence is conflicting, is erroneous; as where it begins thus, “*When the defendant shows,*” &c. *McKenzie v. Br. Bk. Montgomery.* 606
15. *What inferences jury may draw.*—Where the issue involves the application of the proceeds of collateral securities to the payment, *pro tanto*, of several debts, the amount of a debt being shown, the jury may ascertain from it as a basis the *pro rata* share to which it was entitled.—*McKenzie v. Br. Bk. Montgomery.* 606
16. *Charge legally correct and applicable to evidence sustained.*—A party cannot complain of a charge, which, when construed in reference to the evidence, asserts a correct legal proposition: if he desired any explanation of it, he should have asked additional instructions.—*Iveys Adm’r v. Owens and Wife.* 641
17. *Charge erroneous, because invading province of jury.*—A charge which

COURT AND JURY—CONTINUED.

- takes from the jury the right to determine the truth of the evidence, and to ascertain the facts, invades their province, and is therefore erroneous; as where, under the plea of set-off, it asserts without hypothesis "that the defendant is entitled to recover" the amount of the set-off claimed.—*Foust v. Yielding*..... 658
18. *Reversal for erroneous charge*.—An erroneous charge is a reversible error, unless the record clearly shows that it was harmless..... 658
19. *When court may charge jury to find for defendant if they believe the evidence*.—To authorize the court to instruct the jury, that if they believe the evidence, they must find for the defendant, the evidence must be clear, without conflict, and leave nothing to be done except to draw a legal conclusion from the facts.—*Lawler v. Norris*..... 675
20. *Charge on portion of evidence in criminal case*.—Under an indictment for an assault with intent to murder, a charge which selects a portion only of the facts disclosed by the testimony, and instructs the jury that, if these facts are proved, "the law presumes that the act was malicious", and that the defendant "intended to kill", is erroneous, because it shifts the burthen of proof, and loses sight of the recognized distinction between civil and criminal cases in the measure of proof; nor is the error cured by further instructing the jury, in a subsequent part of the charge, that these presumptions of law only arise in the absence of evidence tending to qualify or explain the selected facts, and may be rebutted, qualified, or explained away by the evidence, "so that, if they find the facts upon which these presumptions of law arise, with other evidence tending to qualify or explain them, it will be their duty to consider all the evidence in connection, and if, upon the whole evidence, they entertain a reasonable doubt, they should acquit the defendant."—*Ogle-tree v. The State*..... 693
21. *Charge properly confined to matters in issue*.—The court is not bound to instruct the jury, at the defendant's request, "that they cannot find the defendant guilty of an assault with intent to murder, unless they are satisfied from the evidence, beyond a reasonable doubt, that, if death had ensued from the assault, he would have been guilty of murder in the first degree."..... 693

CRIMINAL LAW.

1. *Admissibility of confessions of guilt*.—Confessions of guilt voluntarily made by the defendant after he was arrested, and whilst his hands and feet were tied, are admissible evidence against him.—*Franklin v. The State*..... 9
2. *Power of court over proceedings in fieri*.—Where the trial and conviction occur at the term at which the indictment was found, the court may, at any time during that term, as well after as before conviction, cause the clerk to endorse the indictment "filed," to date the endorsement according to the fact, and sign it; and may also cause an entry to be made on the minutes, that the indictment was returned into court by the grand jury, with the day on which it was so returned. Over such matters the court has control during the term, and may alter, amend, or set them aside, as justice may require..... 9
3. *Polygamy*.—A decree of divorce obtained in Arkansas, by a person

CRIMINAL LAW—CONTINUED.

- domiciled in Alabama, would be void, and would constitute no defence to a prosecution in Alabama for polygamy, if the decree was procured by fraud, or if the defendant did not go to Arkansas, *animo manendi*, or if he went thither merely for the purpose of obtaining a divorce, and with the intention of remaining no longer than was necessary to accomplish that purpose.—*Thompson v. The State*. 12
4. *Ownership of slave how proved*.—The ownership of a slave, when alleged in an indictment, cannot be proved by general reputation.—*Corley v. The State*. 22
5. *Charge upon credibility and sufficiency of evidence held erroneous*.—Where a witness for the prosecution is impeached by proof of his contradictory declarations on a material point, it is error to instruct the jury, "that they must believe the witness for the State." Such a charge invades the province of the jury, who are the sole judges of the credibility and degree of credit to be accorded to each witness; and it is also objectionable, because the contradicting evidence, though less credible than the testimony of the witness for the State, may yet be sufficient to raise a reasonable doubt in the minds of the jury, and thus secure the defendant's acquittal. 22
6. *Challenge of juror for cause on account of fixed opinion against capital or penitentiary punishment*.—On the trial of a person under an indictment for an offence which may be punished capitally or by confinement in the penitentiary, it is a good challenge for cause by the State that a juror has a fixed opinion against capital or penitentiary punishments.—*Stalls v. The State*. 25
7. *Right to challenge for this cause may be lost, and when lost, cannot be revived*.—If the juror is accepted by the State, and afterwards by the prisoner, the State's right of challenge for this cause is lost, and cannot be again revived by any act of either the solicitor or the court, against the objection of the prisoner, although the existence of the cause of challenge was unknown to the solicitor and court when the juror was accepted by the State. 25
8. *Setting aside juror for cause of challenge, after acceptance, reversible error*.—If the court improperly set aside a juror for a cause of challenge on the part of the State which has been lost by previously accepting him, and the prisoner excepts to its decision, the error entitles him to a reversal of the judgment of conviction. 25
9. *Change of venue in criminal case discretionary*.—The granting of an application for a change of venue in a criminal case (Code, §§ 3608, 3609) is discretionary with the court to which the application is made, and its refusal is not revisable in the appellate court by *mandamus* or otherwise. (*Rice, C. J., dissenting.*)—*Ex parte Banks*. 28
10. *Gaming*.—*Windham's case*, 26 Ala. 69, and *Brown's case*, 27, *ib.* 47, as to construction of statute against gaming, re-affirmed.—*Sweeney v. The State*. 47
Also, *Huffman v. The State*. 48
11. *Charge dispensing with proof of venue, erroneous*.—Held, on the authority of *Brown's case*, 27 Ala. 47, that a charge which instructed the jury "that, if they believed the evidence, they must find the defendant guilty," when the bill of exceptions purported to state all the evidence,

CRIMINAL LAW—CONTINUED.

- but did not show that the venue was proved, was erroneous.—*Huffman v. The State*. 48
12. *Sufficiency of clerk's certificate to transcript on change of venue*.—On change of venue in a criminal case, it is not necessary that each paper, order, &c., found in the transcript, should be mentioned and verified by name in the clerk's certificate. If his certificate states "that the foregoing pages contain a full, true, and complete transcript of the indictment and all papers on file in his office, and of all the entries relating to the case, as found in his office," it is a substantial compliance with the statute (Code, § 3613), and the presumption of law is in favor of the correctness of the proceedings.—*Ward v. The State*. 53
13. *Variance between averment and proof as to name of person assaulted*. A variance between the averment of the indictment and the proof, as to the name of the person assaulted, is immaterial, where the names may be sounded alike without doing any violence to the letters found in the variant orthography; as in the names *Chambliss* and *Chambles*. 53
14. *Admissibility of evidence in extenuation of assault*.—Evidence showing that the person assaulted "was a lazy vagabond, who would not work if he could help it; that money could not be made out of him by legal process; that he had been indebted to the defendant a long time, and would not pay; and that defendant, on the morning of the day on which (in the evening) the assault was committed, had offered him ten dollars per hour if he would work for him in payment of said indebtedness, and he had refused to do it," is not admissible for the defendant in mitigation or extenuation of the assault. 53
15. *Bastardy, proceedings under act*.—It is not error to refuse to instruct the jury, at the defendant's request, "that they ought to acquit unless the proof showed beyond a reasonable doubt that he was guilty"; but it is erroneous to instruct them, "that, if the State produced a preponderance of evidence, they might upon such preponderance of proof find the defendant guilty.—*Satterwhite v. The State*. 65
16. *Arson, sufficiency of indictment for*.—A count in an indictment for arson, which does not charge the ownership of the property alleged to have been burned, is substantially defective on motion in arrest of judgment.—*Martin and Flinn v. The State*. 71
17. *Admissibility of evidence of previous attempt to procure burning*.—The fact that the defendant, some five or six months before the burning charged in the indictment, requested another person (witness) to burn the house, is admissible evidence against him. 71
18. *Admissibility of evidence showing defendant's connection with attempts to suppress testimony of witness for prosecution*.—Promises and threats made by a third person, after indictment found, to a witness for the prosecution who had been before the grand jury, to induce him to leave the State, to the effect that, if he would leave, defendant "would pay him \$200 or \$300, and would give him money to set up business in New Orleans, and, if he refused, would kill him, or get some one else to kill him," are not admissible evidence against the defendant, unless his connection with the person by whom they were made is otherwise shown; but the facts that the witness, at the time appointed for his departure

CRIMINAL LAW—CONTINUED.

- with the person (one E.) who made the representations, "passed by defendant's house, and saw defendant standing in his door,—that defendant waived his hand to him to pass on by, which he did for a short distance, and waited a short time there, when E. came out of the house, with defendant's horse and buggy, and he saw defendant give him some \$25 for him," and that E. then carried him away with the horse and buggy, are competent evidence to be weighed by the jury. 71
19. *Knowledge of insurance necessary to establish intent to charge insurer.* To justify a conviction for arson, under a count charging the burning to have been done "with intent to charge or injure the insurance company," the jury must be satisfied from the evidence that the defendant had knowledge of the insurance. 71
20. *Corroborating evidence must tend to show guilt.*—The testimony of a witness for the prosecution, who is shown to be unworthy of credit, is not sufficient to justify a conviction, without corroborating evidence; and such corroborating evidence, to avail anything, must be of a fact tending to show the guilt of one or both of the defendants. 71
21. *Verdict of guilty on single count.*—Where an indictment contains several counts, a verdict of "guilty as charged in the second count" is equivalent to an acquittal on the other counts. 71
22. *Lotteries.*—*When sale of foreign tickets is within statute.*—A resale of a ticket in a lottery not authorized by the legislative authority of this State, by a third person totally disconnected from the lottery, is not a violation of the statute (Code, § 3254), when his previous purchase extinguished all interest or ownership of every agent, conductor, manager, or proprietor in the ticket; but otherwise it is.—*Salomon and Boullemet v. The State.* 83
23. *Evidence tending to prove concernment in carrying on lottery.*—Evidence showing that a bookseller in this State, through a series of months, kept on hand in his store tickets in a lottery not authorized by the legislative authority of this State, and at various times sold them; that he continued to keep such tickets on hand, after having been indicted and convicted for selling them, and instructed his clerk to inform persons applying for such tickets that he could not sell them, and refused as a general thing to sell them, but yet did sell to some persons,—tends to prove that he was concerned in carrying on the lottery. 83
24. *Burthen of proving his purchase rests on defendant.*—Where evidence is adduced by the State showing that the defendant had sold tickets in a foreign lottery under such circumstances as tend to prove that he was concerned in carrying on the lottery, if the defendant wishes to protect himself on the ground that he had previously purchased such tickets, and that he had no connection with the lottery, the *onus probandi* rests on him; and if he fails to adduce any evidence of that fact, a charge which assumes that there is such evidence, or which refers to such purchase as a material fact in the cause, is abstract, and may properly be refused, although it assert a correct legal proposition. 83
25. *Bail in capital cases.*—Under the provisions of the constitution (Art. I, § 17) and laws (Code, §§ 3669–70), a person indicted for murder is entitled to bail, as a matter of right, unless the court to which the application is made is of opinion, on the evidence adduced, that he is guilty

CRIMINAL LAW—CONTINUED.

- of murder in the first degree; and if the application for bail is made to a circuit judge, and is by him refused, the evidence in the case may be set out on exceptions (Code, § 3673), and application made thereon to the supreme court.—*Ex parte Banks* 89
26. *Murder in the first degree not here shown*.—Upon the evidence set out in the bill of exceptions (for which in full see statement of the case), the defendant was held entitled to bail as a matter of right, because the court could not, upon that evidence, say that he was guilty of murder in the first degree, as defined by section 3080 of the Code. 89
27. *Amount of bail*.—That the defendant is a man of fortune is a fact which may well be considered in fixing the amount of his bail. 89
28. *Retailing spirituous liquors*.—The charter of an incorporated town gave power to its municipal authorities “to ordain all such ordinances and resolutions, and to make all such regulations, as may by them be deemed necessary for the control of the retailing of spirituous liquors within said town; to grant license for retailing of spirituous liquors within said town, upon such sum, to be paid therefor by each retailer, not to exceed \$2,000 *per annum*, as said intendant and council may order; to restrain and prohibit them, when deemed a nuisance; and, in general, to adopt such a system of police and municipal regulation, in regard to the traffic in ardent spirits, as shall be deemed by them most conducive to public order, morality and policy, in reference to the black or colored population:” *Held*, that the term “retailing,” construed with reference to the general policy of the law in relation to the sale of ardent spirits, meant selling in small quantities; and that, though the charter authorized the entire prohibition of *retailing*, yet an ordinance which prohibited, under a penalty, the sale of spirituous liquors in less quantities than twenty gallons, without a license, was unauthorized and void.—*Harris v. Intendant, &c., of Livingston* 577
29. *Assault with intent to murder—Variance*.—Under an indictment for an assault on A, with intent to murder, the defendant’s threats, made several hours “previous to the fight”, that he would kill B, are not admissible evidence against him.—*Ogletree v. The State* 693
30. *Same—Intent*.—To constitute an assault with intent to murder, which is a felony by statute, it is not sufficient to prove a general felonious intent, or any other than the particular intent alleged in the indictment; the burthen of proving the alleged intent, as well as the other facts which constitute the felony, is on the State; and its actual existence is a question of fact for the jury, in the decision of which they ought to act upon those presumptions which are recognized by the law, so far as they are applicable, and their own judgment and experience, as applied to all the circumstances in evidence. 693
31. *Same—Charge of court erroneous*.—Under an indictment for an assault with intent to murder, a charge which selects a portion only of the facts disclosed by the testimony, and instructs the jury that, if these facts are proved, “the law presumes that the act was malicious”, and that the defendant “intended to kill”, is erroneous, because it shifts the burthen of proof, and loses sight of the recognized distinction between civil and criminal cases in the measure of proof; nor is the

CRIMINAL LAW—CONTINUED.

- error cured by further instructing the jury, in a subsequent part of the charge, that these presumptions of law only arise in the absence of evidence tending to qualify or explain the selected facts, and may be rebutted, qualified, or explained away by the evidence, "so that, if they find the facts upon which these presumptions of law arise, with other evidence tending to qualify or explain them, it will be their duty to consider all the evidence in connection, and if, upon the whole evidence, they entertain a reasonable doubt, they should acquit the defendant." 693
32. *Same—Charge asked properly refused.*—The court is not bound to instruct the jury, at the defendant's request, "that they cannot find the defendant guilty of an assault with intent to murder, unless they are satisfied from the evidence, beyond a reasonable doubt, that, if death had ensued from the assault, he would have been guilty of murder in the first degree." 693
33. *Distinction between civil and criminal cases in measure of proof.*—In a civil action, if the plaintiff establishes a *prima facie* case, the burthen of proof is thereby shifted, and he is entitled to recover, unless his *prima facie* case is destroyed by proof from the defendant; but in a criminal case, the State being required to prove, beyond all reasonable doubt, the facts which constitute the offense, the establishment of a *prima facie* case only does not take away the presumption of the defendant's innocence, nor shift the burthen of proof. 693

CUSTOM.

1. *When admissible.*—Evidence of a local custom is admissible, to supply details in a contract, either oral or written, as to which the contract itself is silent; or to show that provincialisms, and technicalities of science and commerce, have acquired a known, fixed, and definite meaning, different from their ordinary import; or where such technicalities, unexplained, are susceptible of two or more reasonable constructions: but it cannot be received to contravene any positive requirement of the law, any principle of public policy, or an express contract, whether oral or written, nor to give to plain and unambiguous words or phrases a meaning different from their natural import; and it is therefore inadmissible to show that a stipulation, in a contract of hiring, that the hirer was to "lose the negro's lost time," "related to time lost by sickness or running away, and not to time lost in consequence of the negro's death."—*Barlow v. Lambert*, 704

DAMAGES.

1. *In trespass.*—In trespass for taking and carrying off slaves, the court charged the jury, "that, if they found for the plaintiffs, the measure of damages would be the highest value of the slaves at any time between the taking and the trial; that, in addition to this value, they might allow interest thereon, or might look to the value and hire as some guide in coming to a conclusion, but were not bound by them": *Held*, that the charge was not erroneous.—*Hair v. Little*, 236
2. *Exemplary damages, when allowable.*—Exemplary damages, or "smart

DAMAGES—CONTINUED.

money", may be allowed to the plaintiff, in trespass for taking and carrying away his goods, when there are circumstances of aggravation attending the trespass; and if the evidence authorizes exemplary damages against one defendant, the other, if shown to have acted in concert with him, is liable to the same extent. 236
See CASE, ACTION ON THE.

DEEDS AND CONVEYANCES.

1. *Deed, when admissible evidence.*—A deed of conveyance, executed by the commissioners, under an order of the orphans' court, to the purchaser at their sale, is admissible evidence for a remote purchaser from him, when sued by the intestate's heir-at-law; and though the description contained in it does not correspond with the description of the land sued for, yet, if it embraces any portion of the land sold, a general objection to it may be overruled.—*Doe d. Saltonstall and Wife v. Riley and Dawson* 164
2. *Boundaries of land how determined.*—Streets which are well defined and designated by some natural or artificial monument, must govern course and distance in fixing the boundaries of lands; but streets which, in the infancy of a city or town, are only undefined portions of land dedicated to public use, themselves requiring to be located, would furnish very uncertain guides in arriving at the boundaries of other lands. . . 164
3. *Admissibility of parol evidence to affect consideration clause of deed.*—Where the consideration expressed in a deed is a certain sum of money in hand paid, parol evidence is admissible to show that only a part of the money was paid, and that the balance was to be applied in discharge of certain debts due from the grantor to third persons.—*Hair v. Little*. 236
4. *Record copy of deed, conclusiveness of.*—A record copy of a lost deed, or a transcript from the record, which is declared by the statute (Clay's Dig. 155, § 25) to be "as good and effectual and available in law as if the original deed were then and there produced and proved", is only *prima facie* evidence of the contents of the deed, on the ground that all public officers must be presumed to have discharged the duties which the law requires of them; but parol evidence is admissible to show that it was not correctly recorded.—*Harvey and Wife v. Thorpe*. 250
5. *Presumption of conveyance from long-continued possession.*—Where defendant shows a letter from plaintiff's ancestor to an agent, directing him to close a bargain for the sale of the land, a deed thereupon executed by the agent, in his own name, to defendant's vendor, and an uninterrupted possession of twenty-eight years; the court may instruct the jury, that they may presume a conveyance from plaintiff's ancestor, either to the agent, or to his vendee. 250
6. *Instrument held a deed, and not a will.*—A writing under seal, in form a deed, by which a father, in consideration of natural love and affection, conveyed to his daughter and her children, by present words of gift, several negroes and other personal property, contained this clause, "The condition of the above-named gift is to take place at my death; until then, the property is to remain as my own": *Held*, that the instrument was a deed, and not a will.—*Elmore v. Mustin* 309

DEEDS AND CONVEYANCES—CONTINUED.

7. *Construction of deed of gift.*—A father conveyed certain negroes and other personal property, by deed of gift, to his "daughter Sarah, and to her children, the natural heirs of her body, at her death", "to have and to hold unto the said Sarah, her executors and administrators forever, as her and her children's property"; and the deed reserved the use and possession of the property to the donor during his life: *Held*, that the deed created a life estate in the said Sarah, with a *quasi* contingent remainder to such of her children as might be living at her death..... 309
8. *Uncertainty in deed.*—The owners of lands through which a railroad, then in process of construction, would probably pass, joined in a sealed instrument, by which, in consideration of one dollar in hand paid, they bargained, sold and conveyed to the railroad company, in present words, "so much of any part of our (their) lands as may be necessary in the construction of said railroad": *Held*, that the instrument, though it might not operate as a conveyance in fee of the land necessary for the construction of the road, was not void for uncertainty, but was binding as a covenant that the company might appropriate so much of any part of the grantors' lands as might be necessary for the construction of the contemplated railroad.—*Pollard v. Maddox*..... 321
9. *Acknowledgment of deed by feme covert.*—An acknowledgment by a married woman, on private examination apart from her husband, "that she signed, sealed, and delivered the above instrument, on her own free will and accord, and without any force, persuasion, or threats from her said husband, and for the express purposes therein stated", is not a substantial compliance with the provisions of the statute (Clay's Dig. 155, § 27), which requires an acknowledgment "that she signed, sealed, and delivered" the deed, "as her voluntary act and deed, freely, without any fear, threats, or compulsion of her said husband.—*Boykin v. Rain*..... 332
10. *Construction of trust deed.*—A deed conveyed certain slaves to a trustee "for the support and maintenance" of a married woman "and her children during her life, and at her death to become the absolute property of her children", with power to the trustee, if he at any time should deem it necessary, to sell any portion of the property, and to apply the proceeds to the support and maintenance of the beneficiaries. On bill filed by the beneficiaries against the trustee, the record did not show that the husband had ever claimed his wife's interest in the property; and the court cited *Hill and Wife v. McRae*, 27 Ala. Rep. 175, as indicating their views with respect to the wife interest.—*Henderson v. Segars*..... 352
11. *Deed of widow, before assignment of dower, passes what interest.*—If the widow of the mortgagor, while in possession of the mortgaged premises, before dower is assigned to her, conveys by deed to the mortgagee, if her deed is effective for any purpose as against the heirs, her alienee certainly does not thereby acquire more than the right to retain one third of the rents and profits of the premises.—*Hunt and Frowner v. Acre and Johnson*..... 580

DEPOSITIONS.

1. *Deposition of sole witness.*—When the claim or defense, or a material part thereof, depends exclusively on the evidence of a single witness, his deposition may be taken (Code, § 2318, ¶ 5), and may be read on the trial, although he resides within one hundred miles of the court. *May's Heirs v. May's Adm'r.* 141
2. *Objection to entire deposition, when made.*—An objection to an entire deposition, on account of defects in the commissioner's certificate, must be made (Code, § 2328) before the trial commences, and comes too late afterwards, though made as soon as the deposition is opened by the court. 141
3. *Motion to suppress depositions for defects in commissioner's return.*—A commissioner, appointed to take the deposition of a witness in a chancery cause, has power to administer the necessary oath, and to make a return to the court under whose authority he acts; and where his return embraces the commission, the interrogatories, the caption of the answers, and the certificate, all these together must be looked to in determining whether he performed his duty. A defect in one part of the return, when supplied in another part, is no ground for suppressing the deposition. If the return states that the deposition was taken pursuant to the commission, it is not essential that it should also state the manner of pursuing the commission. If it states that the witness was "sworn and examined" by the commissioner, "by virtue of a commission" issued out of the court to which the return is made; and the commission and interrogatories returned specified the particular case; and the deposition shows that the witness, at the time he was answering the interrogatories, knew that he was testifying in that particular case,—the presumption is, that the commissioner swore the witness by virtue of that commission, and in the case therein specified.—*King v. King.* 315
4. *General motion to suppress deposition.*—A general motion to suppress a deposition, which does not specify any particular grounds of objection, if it can be considered at all in the appellate court, will receive the strongest construction that it reasonably admits of against the objecting party.—*Walker and Wife v. Smith.* 569

DETINUE.

1. *Misjoinder of plaintiffs fatal.*—In detinue for a slave, by several remainder-men, tenants in common, after termination of precedent life estate, if the wife, whose interest is vested in her husband, be joined as co-plaintiff with him, the misjoinder is fatal to the entire action. *Walker v. Fenner.* 367
2. *Plea of title before suit brought defective.*—In detinue for a slave, a plea which only shows that the title was in the defendant on a specified day before the commencement of the action, is bad on demurrer.—*Patton v. Hamner.* 618

DIVORCE.

1. *Dissolubility of marriage contract.*—The English doctrine, that the dissolubility of the marriage contract depends upon the law of the

DIVORCE—CONTINUED.

- country in which it was solemnized, is founded on the doctrine of perpetual allegiance, is therefore inconsistent with the spirit of our institutions, and is here repudiated.—*Thompson v. The State*. 12
2. *Jurisdiction of courts of husband's domicile to grant divorce*.—The husband has a right to emigrate and acquire a new domicile, and thereby acquires, as a consequence, the right of having his matrimonial status controlled by the laws and judicial tribunals of the country of his new domicile, although his wife remains in the State which he left. 12
3. *Validity of foreign decree of divorce rendered on publication*.—The general principle, that judgments and decrees, when set up in a different State from that in which they were rendered, may be avoided, when the court had no jurisdiction of the defendant's person and there was no appearance, does not apply to decrees of divorce rendered on publication against non-resident defendants, the validity of which depends on the statutes of the State in which they were rendered, and results necessarily from the existence of the jurisdiction. 12
4. *Arkansas statutes on subject of divorce construed*.—Under the statutes of Arkansas, as shown in evidence in this case, the fact that the cause of divorce commenced and existed out of that State, and was not continued or completed there, would not render void a decree there obtained by a husband who had resided an entire year in that State. 12
5. *What would render void foreign decree of divorce*.—A decree of divorce obtained in Arkansas, by a person domiciled in Alabama, would be void, and would constitute no defense to a prosecution in Alabama for polygamy, if the decree was procured by fraud, or if the defendant did not go to Arkansas *animo manendi*, or if he went thither merely for the purpose of obtaining a divorce, and with the intention of remaining no longer than was necessary to accomplish that purpose. 12
6. *When cruelty of husband, though not without provocation, is ground of divorce*.—Irritability of temper on the part of the husband, producing ungovernable passion, and occasionally ending in acts of personal violence, renders cohabitation unsafe, and is a peril from which the wife is entitled to protection, although she may not have been wholly blameless. When the passions of the husband are shown to be so much beyond his own control, that it is inconsistent with the personal safety of the wife to continue in his society, it is immaterial from what provocation such violence may have originated.—*King v. King*. 315
7. *Confession of parties admissible but not sufficient evidence*.—Under section 1966 of the Code, by which it is enacted that, in suits for divorce, "no decree can be rendered on the confessions of the parties", the confessions of the parties are not rendered inadmissible, but are only declared insufficient, when they constitute the only evidence of the alleged cause of divorce: a decree may be rendered on such confessions, in connection with proof of conduct and circumstances which tend to confirm them, and to repel the idea of collusion between the parties. 315
8. *Alimony, amount of*.—Where a divorce is granted to the wife on the ground of cruelty, a sum of money equal to the legal interest on one-third of the value of the husband's real estate, together with a gross

DIVORCE—CONTINUED.

- sum equal to one-fifth of his personal estate, is not an unreasonable amount for her alimony; there being no children of the marriage to be provided for, and the husband's children by a former marriage having already received advancements. 315
9. *Decree of divorce, effect of.*—A decree of divorce *a vinculo*, in favor of the wife, defeats and determines all the rights and interest of her husband in, and to her lands, and of others claiming under a mortgage executed by him, and restores her rights precisely as her husband's death would have restored them.—*Boykin v. Rain*. 332
10. *Insanity or lunacy avoids marriage.*—A valid marriage cannot be contracted by an insane person, nor by a lunatic except during a lucid interval, since he cannot consent to any contract; but mere weakness of mind, unless it amounts to derangement, is not sufficient to avoid the marriage.—*Rawdon v. Rawdon*. 565
11. *Burthen of proving insanity or lunacy.*—The party who alleges insanity or lunacy, in avoidance of a contract, must prove it; but, when the existence of lunacy is once established, it devolves on the opposite party to prove, by testimony equally convincing, that the contract was made during a lucid interval. 565
12. *Decree of divorce on account of insanity unnecessary yet proper.*—If a marriage is void by reason of the insanity of either one of the contracting parties, no decree of divorce is necessary to restore the parties to their original rights; yet a decree of divorce, in such case, is conducive to good order and decorum, and to the peace and conscience of the party seeking it. 565
13. *Lapse of time bars relief.*—The lapse of twenty-two years after the discovery of the alleged insanity, before filing bill to avoid marriage on that ground, is a bar to the relief sought. 565

DOWER.

1. *Deed of widow, before assignment of dower, passes what interest.*—If the widow of the mortgagor, while in possession of the mortgaged premises, before dower is assigned to her, conveys by deed to the mortgagee, if her deed is effective for any purpose as against the heirs, her alienee certainly does not thereby acquire more than the right to retain one-third of the rents and profits of the premises.—*Hunt and Frowner v. Acre and Johnson*. 580

ERROR.

I. WHAT ERRORS ARE NOT REVERSIBLE.

1. *Charge upon sufficiency of evidence in proceeding under bastardy act.*—It is not error, in a bastardy proceeding, to refuse to instruct the jury, at the defendant's request, "that they ought to acquit unless the proof showed, beyond a reasonable doubt, that he was guilty."—*Satterwhite v. The State*. 65
2. *Error without injury.*—In contesting the validity of a will, the sustaining of a demurrer to one of the contestant's pleas, when he had the full benefit of the same facts under the issues presented by his other pleas, is not an available error.—*Dunlap v. Robinson*. 100

ERROR—CONTINUED.

3. *Same*.—The admission of parol evidence, to prove a fact, in aid of the record, which the court must have judicially known, is not a reversible error.—*Doe d. Saltonstall and Wife v. Riley & Dawson* 164
4. *Same*.—When all the evidence is set out in the bill of exceptions, and shows that the plaintiff was not entitled to recover, the appellate court will not reverse in his favor on account of erroneous charges or refusals to charge 164
5. *Presumption in favor of judgment*.—In a suit on a promissory note, where the record shows a judgment on verdict for the plaintiff, while it appears from the bill of exceptions that the defendant pleaded the statute of limitations, that evidence of a subsequent promise was introduced, and that a charge was asked by the defendant predicated on that evidence, it will be presumed, on error, that a replication was filed, and that an issue was before the jury to which the evidence and the charge were applicable.—*Bettis v. Saint* 214
6. *Waiver of irregularities by failing to object—Clerical misprision*.—If a writ be sued out against two administrators, and the suit discontinued in the declaration as to one, on whom process was not served, on the ground of non-residence, the other defendant, if he appear and defend without objection, cannot avail himself of the irregularity (if any) on error; and the naming of the non-resident administrator, as a defendant, in the margin of the minute entries, is a mere clerical mistake.—*Shorter v. Urquhart* 360
7. *Defective service of process not available on error*.—The sheriff's failure to serve a copy of the complaint with the summons is a mere irregularity, which, after judgment by default, is not available on error.—*Dew v. Cunningham* 466
8. *Overruling demurrer to several pleas of which one is good*.—Where a demurrer to several pleas, each going to the whole declaration, is overruled, and the plaintiff declines to reply, the judgment on the demurrer will not be reversed on error, if any one of the pleas is good, since the erroneous overruling of the demurrer to the others could not have prejudiced the plaintiff.—*Jesse v. Cater* 476
9. *Judgment corrected and affirmed*.—Where the affidavit for the garnishment is made by the real owner of the judgment of which satisfaction is sought, and judgment is rendered in his name against the garnishee, while the affidavit and garnishment correctly describe the original judgment, the judgment will be corrected in the appellate court, at the costs of the appellant, and rendered in the name of the plaintiff in the original judgment.—*Jackson v. Shipman* 488
10. *Error without injury in rendering judgment for costs against surety on claim bond*.—The rendition of a joint judgment for costs against the claimant and his surety on the claim bond, even if erroneous, is not prejudicial to the claimant, and for that reason is not available on error 585
11. *Admission of evidence prima facie irrelevant cured by subsequent proof*.—The admission of evidence which, when offered, was *prima facie* irrelevant, is not a reversible error, when the record shows that its relevancy was made to appear by evidence subsequently introduced.—*King v. Pope* 602

ERROR—CONTINUED.

II. WHAT ERRORS ARE REVERSIBLE.

12. *Charge upon credibility and sufficiency of evidence held erroneous.*—Where a witness for the prosecution is impeached by proof of his contradictory declarations on a material point, it is error to instruct the jury, "that they must believe the witness of the State, unless they believe that the contradicting witness is entitled to more weight and credit than said witness for the State." Such a charge invades the province of the jury, who are the sole judges of the credibility and degree of credit to be accorded to each witness; and it is also objectionable, because the contradicting evidence, though less credible than the testimony of the witness for the State, may yet be sufficient to raise a reasonable doubt in the minds of the jury, and thus secure the defendant's acquittal.—*Corley v. The State*..... 22
13. *Setting aside juror for cause of challenge, after acceptance, reversible error.*—If the court improperly set aside a juror for a cause of challenge on the part of the State which has been lost by previously accepting him, and the prisoner excepts to its decision, the error entitles him to a reversal of the judgment of conviction.—*Stalls v. The State*..... 25
14. *Charge dispensing with proof of venue, erroneous.*—Held, on the authority of Brown's case, 27 Ala. 47, that a charge which instructed the jury "that, if they believed the evidence, they must find the defendant guilty," when the bill of exceptions purported to state all the evidence, but did not show that the venue was proved, was erroneous.—*Huffman v. The State*..... 48
15. *Charge upon sufficiency of evidence in proceeding under bastardy act.*—It is erroneous to instruct the jury, in a proceeding under the bastardy act, "that if the State produced a preponderance of evidence, they might upon such preponderance of proof find the defendant guilty."—*Satterwhite v. The State*..... 65
16. *Reversal on account of erroneous charge, notwithstanding deficiencies in plaintiff's proof.*—Where plaintiffs claim under a deed of gift, which the court erroneously holds to confer no title on them, and therefore charges the jury that, on all the evidence, they are not entitled to recover, the judgment will be reversed at their instance, although the bill of exceptions, while purporting to set out all the evidence, does not show that they proved their identity with the donees named in the deed.—*Elmore v. Mustin*..... 309
17. *Reversal for erroneous charge.*—An erroneous charge is a reversible error, unless the record clearly shows that it was harmless.—*Foust v. Yielding*..... 658

ESTATES OF DECEASED PERSONS.

1. *Statute of distribution (Code, § 1990), as to separate estates of married women dying intestate, construed.*—The provisions of the Code (§§ 1990, 1997), regulating the distribution of the separate estate of a married woman dying intestate, do not apply to separate estates created by deed before the 1st March, 1848, although the marriage took place after that day; and the husband, in such case, takes nothing under the statute.—*Willis v. Cadenhead*..... 472

ESTOPPEL.

1. *Estoppel under covenant and by acts in pais.*—The owner of lands through which a railroad passed, having previously granted the right of way to the company, was apprised when the agents of the company entered on his land to open the road, and knew that they claimed the right under his deed, but raised no objection, and took a contract for supplying the company with a portion of the materials used in the construction of the road: *Held*, that he was estopped from afterwards bringing trespass against the members of the company, although the instrument by which he conveyed the right of way might be inoperative as a deed.—*Pollard v. Maddox*. 321
2. *Estoppel against trustee by acceptance of trust.*—A trustee for a married woman and her children, under appointment from the chancery court, knowing at the time of his acceptance that the deed creating the trust was fraudulent as to creditors, assumes all the duties, liabilities and disabilities which attach to ordinary trustees, and is estopped from setting up against the beneficiaries the claims of creditors, or his own claims as surety of the debtor.—*Henderson v. Segars*. 352
3. *Estoppel by recognition of partition fence.*—The recognition by the parties, as a partition fence, of a structure which is built entirely on the land of one proprietor, operates as an estoppel *in pais*, and prevents either from complaining of any act done by the other which would have been lawful if the fence had been on the division line.—*Henry v. Jones*. . . . 385
4. *Estopped by submission and award.*—Where a submission to arbitration is made under an order of court, and the award entered up as the judgment of the court, a party is not thereby estopped from pleading any matter not necessarily within the scope of the award.—*Jesse v. Cater*. . . 475
5. *Estoppel by deed.*—If the maker of a note, having an equitable set-off which is available against an assignee after maturity, executes a mortgage to the assignee to secure the payment of the note, this does not estop him from afterwards setting up against the assignee his equitable set-off.—*Carroll v. Malone*. 521
6. *Estoppel in pais against selling up defense to note.*—If the maker of a promissory note induces a third person to trade for it, by assuring him that he has no set-off against it, and that he will pay it promptly, he cannot afterwards assert any ground of relief against the purchaser.—*Drake v. Foster*. 649
7. *Estoppel against tenant from denying landlord's title.*—Where the tenant has enjoyed the undisturbed possession of the land during the period of the lease, he is estopped, in any proceeding for the recovery of rent, from denying the landlord's title.—*Cook v. Cook*. 660
8. *Estoppel against mortgagee.*—Conceding that a mortgagee, who, prior to the execution of his mortgage, consented to a postponement of the sale of the property under execution against the mortgagor, is thereby estopped, in a contest with the plaintiff in execution, from saying that the delay is constructively fraudulent as against his mortgage; yet this does not prevent him from taking advantage of a subsequent postponement without his consent.—*Albertson, Douglass & Co. v. Goldsby*. . . . 711

EVIDENCE.

I. OF PARTIES TO ACTION.

1. *In bastardy proceeding*.—Where the mother and the putative father of the child, both being made witnesses by the statute (Code, § 3807), are examined on the trial, their testimony must be weighed by the jury like that of other witnesses.—*Satterwhite v. The State*..... 65
2. *Answers to interrogatories, admissibility of*.—A party's answers to interrogatories, under the statute in aid of discoveries in common-law suits, if his adversary declines to read them, cannot be considered by the court as evidence for him for any purpose.—*Wells v. Bransford*..... 200
3. *In assumpsit*.—Where plaintiff and defendant are both examined as witnesses under the statute, in assumpsit on the common counts for services rendered, and contradict each other in some particulars, and the defendant then introduces a witness who testifies to conversations of the plaintiff which, in some particulars, contradict her testimony on the trial, the plaintiff cannot be allowed to prove her good character, by the declarations of the defendant, or in any other manner.—*Owens v. White*..... 413
4. *Entries on physician's books evidence of what facts*.—The original entries in the books of a physician, which are declared by the Code (§ 2298) to be "evidence for him, in actions for the recovery of his medical services, that the service was rendered", are evidence of the items of his account for medicines administered and furnished to his patients in the course of his practice; but the value of the medicines, as well as of the active services rendered, must be otherwise proved.—*Richardson v. Dorman's Executrix*..... 679

II. MATTERS JUDICIALLY KNOWN.

5. *General course of business*.—It is the duty of courts judicially to know the general course of the transactions of human life, and whatever ought to be generally known within the limits of their jurisdiction; *e. g.*, the peculiar nature of lotteries, and the mode in which they are generally carried on.—*Salomon and Bouliemet v. State*..... 83
6. *Death of sheriff*.—The sheriff being the executive officer of the orphans' court, that court must be presumed to have known when his term of office expired, whether by limitation or death, and to have acted on its judicial knowledge. The admission of parol evidence, therefore, in aid of the record, even if erroneous, is error without injury.—*Doe d. Saltonstall and Wife v. Riley and Dawson*..... 164

III. SUBSTANCE OF ISSUE.

7. *Variance between averment and proof as to name of person assaulted*.—A variance between the averment of the indictment and the proof, as to the name of the person assaulted, is immaterial, where the names may be sounded alike without doing any violence to the letters found in the variant orthography; as in the names of *Chambless* and *Chambles*.—*Ward v. The State*..... 53
8. *Evidence confined to matters in issue*.—If the declaration alleges that the injuries complained of were done by defendant's children and servants, plaintiff cannot be allowed to prove injuries done by the defendant himself in person; and defendant's threats that he would kill the

EVIDENCE—CONTINUED.

- hogs are therefore inadmissible, because they tend to show that he did kill them.—*Smith v. Causey* 655
9. *Unnecessary averment, if descriptive, must be proved.*—If the declaration alleges that the injury was done with the defendant's dogs, the averment, though unnecessary, cannot be disregarded, since it is descriptive of the cause of action. 655
10. *Variance in criminal case.*—Under an indictment for an assault on A, with intent to murder, the defendant's threats, made several hours "previous to the fight," that he would kill B, are not admissible evidence against him.—*Ogletree v. The State*. 693

IV. ADMISSIBILITY AND RELEVANCY GENERALLY.

11. *Indictment for assault and battery—Admissibility of evidence in extenuation.*—Evidence showing that the person assaulted "was a lazy vagabond, who would not work if he could help it; that money could not be made out of him by legal process; that he had been indebted to the defendant a long time, and would not pay; and that defendant, on the morning of the day on which (in the evening) the assault was committed, had offered him ten dollars per hour if he would work for him in payment of said indebtedness, and he had refused to do it," is not admissible for the defendant in mitigation or extenuation of the assault. *Ward v. The State*. 53
12. *Indictment for arson—Admissibility of evidence of previous attempt to procure burning.*—The fact that the defendant, some five or six months before the burning charged in the indictment, requested another person (witness) to burn the house, is admissible evidence against him.—*Martin and Flinn v. The State*. 71
13. *Same.—Admissibility of evidence showing attempts to suppress testimony of witness for prosecution.*—Promises and threats made by a third person, after indictment found, to a witness for the prosecution who had been before the grand jury, to induce him to leave the State, to the effect that, if he would leave, defendant "would pay him \$200 or \$300, and would give him money to set up business in New Orleans, and, if he refused, would kill him, or get some one else to kill him," are not admissible evidence against the defendant, unless his connection with the person by whom they were made is otherwise shown; but the facts that the witness, at the time appointed for his departure with the person (one E.) who made the representations, "passed by defendant's house, and saw defendant standing in his door,—that defendant waived his hand to him to pass on by, which he did for a short distance, and waited a short time there, when E. came out of the house, with defendant's horse and buggy, and he saw defendant give him some \$25 for him," and that E. then carried him away with the horse and buggy, are competent evidence to be weighed by the jury. 71
14. *Indictment for carrying on lottery—Evidence tending to prove concernment.*—Evidence showing that a bookseller in this State, through a series of months, kept on hand in his store tickets in a lottery not authorized by the legislative authority of this State, and at various times sold them; that he continued to keep such tickets on hand, after having been indicted and convicted for selling them, and instructed his

EVIDENCE—CONTINUED.

- clerk to inform persons applying for such tickets that he could not sell them, and refused as a general thing to sell them, but yet did sell to some persons,—tends to prove that he was concerned in carrying on the lottery.—*Salomon and Boullemet v. The State* 83
15. *Trial of issue contesting validity of will—Admissibility of evidence in rebuttal of facts tending to show adulterous intercourse.*—The contestants, for the purpose of showing an adulterous intercourse between the testator and the mother of the children who were his legatees, having adduced evidence of his intimacy with her and her family, his visits to her house during her husband's absence, his familiarity with the children, his presents to them, &c.; *held*, that the proponent might rebut this proof by evidence showing that their intercourse was characterized by a religious sentiment, such as the fact that they frequently attended class-meetings together at church.—*Dunlap v. Robinson*.... 100
16. *Contest of bankrupt's certificate of discharge—Evidence of character.*—When a bankrupt's certificate of discharge is impeached for fraud, evidence of his general good character is not admissible for him.—*Pearsall v. McCartney* 110
17. *Trial of right of property—Insolvency.*—On a trial of the right of property in a slave, where the claimant derives title under a conveyance from the defendant in execution, which is attacked on the ground of fraud, the plaintiff may show that, at the time of the execution of the conveyance, the defendant in execution was insolvent; and evidence of notes outstanding against him at that time, and of a judgment rendered on one of such notes, is admissible as tending to prove the fact of insolvency.—*Beeson v. Wiley, Banks & Co.* 575
18. *Action by attorney for services rendered—Clerk's certificate of reversal of cause in supreme court, admissibility and relevancy of.*—Conceding that the certificate of the clerk of the supreme court, showing the reversal of a cause, is not competent evidence to prove the reversal, in an action brought by the attorney to recover his fees, yet it is neither irrelevant, nor *res inter alios*; and when objected to on these two grounds only, its admission is not erroneous.—*King v. Pope*..... 601
19. *Relevant evidence, though insufficient, admissible.*—The admission of evidence which, though relevant to the issue, is of itself insufficient to entitle the party to a recovery, is not error. 601
20. *Case to recover damages for injuries to hogs—Admissibility of defendant's declarations.*—In an action on the case, to recover damages for injuries done to plaintiff's hogs, by defendant's children and servants, while driving them out of his field, the defendant's declaration, "that plaintiff's hogs were in the habit of running in his field, and that they should not do it any more", is admissible evidence for plaintiff, because it tends, though remotely, to show that the hogs which were injured belonged to plaintiff.—*Smith v. Causey*..... 665
21. *Rebutting evidence.*—In an action by an attorney, to recover for services rendered by him as defendant's agent in going to Louisiana, plaintiff proved a conversation between himself and defendant, in which the latter requested him to accompany him to Louisiana as his agent, and he agreed to go; and that they both left the county in which they

EVIDENCE—CONTINUED.

- resided at the same time. *Held*, that defendant, to rebut this evidence, and to show that they in fact went to Texas, and not to Louisiana, might prove that plaintiff had land and slaves in Texas, and had stated that he had gone to Texas with defendant.—*Jones v. Sterns*. 677
22. *Relevant evidence, though insufficient, admissible*.—Evidence which is relevant to the issue, is admissible, without regard to its weight or sufficiency. 677
23. *Physician's diploma*.—In an action on an open account for services rendered as a physician, a diploma from a medical college would be admissible evidence, if the services were rendered since the passage of the act of 1854, (Pamphlet Acts 1853-4, p. 48,) "to allow all regular graduates of any medical college in the United States to practice medicine"; but, since that act cannot retro-act so as to authorize a recovery for medical services rendered before its passage, and since the Code (§ 977) prohibits a recovery for services rendered by a physician who has not obtained a license from one of the medical boards of this State, a diploma would confer no authority to practice medicine before the passage of the act of 1854, and would therefore not be competent evidence to sustain an action for such services.—*Richardson v. Dorman's Executrx*. 679
- V. ADMISSIONS; CONFESSIONS; DECLARATIONS; HEARSAY; RES GESTÆ.
24. *Admissibility of confessions of guilt*.—Confessions of guilt voluntarily made by the defendant after he was arrested, and whilst his hands and feet were tied, are admissible evidence against him.—*Franklin v. The State*. 9
25. *Ownership of slave how proved*.—The ownership of a slave, when alleged in an indictment, cannot be proved by general reputation.—*Corley v. The State*. 22
26. *Using bill in chancery as evidence in another cause*.—When a bill in chancery is offered in evidence, in another suit, as an admission of the complainant, it is governed by the same rules that apply to all other admissions; and consequently he cannot use his amended bill as rebutting evidence against the original.—*Pearsall v. McCartney*. 110
27. *Declarations explanatory of possession*.—The declarations of a party in actual possession of personal property, tending to explain his possession, are admissible evidence as part of the *res gestæ*.—*Hair v. Little*. 236
28. *Judicial admissions of attorney, conclusiveness of*.—Conceding that attorneys-at-law have power to bind their clients by written admissions as to the facts of a case; yet, where such admissions are made improvidently, or through mistake, the court may relieve against them, by means of its coercive powers over its own officers, and may set them aside upon such terms as will meet the justice of the particular case. *Harvey and Wife v. Thorpe*. 250
29. *Confessions of parties in suits for divorce admissible but not sufficient*.—Under section 1966 of the Code, by which it is enacted that, in suits for divorce, "no decree can be rendered on the confessions of the parties", the confessions of the parties are not rendered inadmissible, but are only declared insufficient, when they constitute the only evidence of the alleged cause of divorce: a decree may be rendered on

EVIDENCE—CONTINUED.

- such confessions, in connection with proof of conduct and circumstances which tend to confirm them, and to repel the idea of collusion between the parties.—*King v. King*..... 315
30. *Judicial fact not proved by admissions*.—The grant of administration, which is a judicial fact, cannot be proved by a party's admissions on oath in another case.—*Shorter v. Urquhart*..... 360
31. *Declarations made through ignorance or mistake*.—In a suit between an executor and the widow of his testator, the declarations of the testator, founded in ignorance or mistake as to his rights, to the effect that certain slaves, which he held under the will of his wife's father, were her separate property, should not be received to divest the property out of his executor.—*Machem v. Machem*..... 374
32. *Admissibility of evidence of plaintiff's general good character*.—Where plaintiff and defendant are both examined as witnesses under the statute, in assumpsit on the common counts for services rendered, and contradict each other in some particulars, and the defendant then introduces a witness who testifies to conversations of the plaintiff which, in some particulars, contradict her testimony on the trial, the plaintiff cannot be allowed to prove her good character, by the declarations of the defendant, or in any other manner.—*Owens v. White*..... 413
33. *Admission of counsel construed*.—Defendant's attorney admitted, for the purposes of the trial, that the slaves sued for were given to the wife of the plaintiff's intestate during coverture, and went into their possession under the gift; but with the reservation, that 'this admission was not intended to preclude the defendant from showing, by legal proof, that the wife, by the terms of the gift, took an estate in said slaves to her sole and separate use, to the exclusion of the marital rights of her said husband, or that said intestate did not have any title to said slaves.' *Held*, that the admission did not preclude the defendant from proving, by the declarations of the donor, of the intestate, and of his wife, that no title vested in the intestate by the gift.—*Gillespie's Adm'r v. Burlison*..... 552
34. *Admissibility of donor's declarations*.—The declarations of the donor, made previous to the consummation of the gift, but while it was under consideration and discussion by him, and in reference to and contemplation of it, and explanatory of his intention, are competent evidence in a suit involving the title; his declarations at the time of delivery, and in explanation thereof, are also admissible as part of the *res gestæ*; but his declarations after the consummation of the gift are inadmissible, either for the purpose of affecting the gift, or explaining his words or conduct at the time of the gift..... 552
35. *Declarations in disparagement of title, admissibility of*.—The declarations of the husband, while in possession of slaves, to the effect that they are the separate property of his wife, are competent evidence against his administrator, in a suit brought by him against a purchaser from the wife after the death of the husband..... 562
36. *Admissibility of wife's declarations of title*.—Where slaves are in the possession of husband and wife, the wife's assertions of title, when made in the presence of her husband, and acquiesced in by him, are

EVIDENCE—CONTINUED.

competent evidence against his administrator, in a suit brought by the latter against her vendee; but her assertions of title, when not made in the presence of her husband, nor communicated to him, are not competent evidence for her vendee, unless made while she had possession of the slaves, and explanatory of her possession. 552

37. *Action on the case.*—In an action on the case, to recover damages for injuries done to, plaintiff's hogs, by defendant's children and servants, while driving them out of his field, the defendant's declaration, "that plaintiff's hogs were in the habit of running in his field, and that they should not do it any more," is admissible evidence for plaintiff, because it tends, though remotely, to show that the hogs which were injured belonged to plaintiff.—*Smith v. Causey*. 655

VI. PAROL, WHEN ADMISSIBLE TO AFFECT WRITTEN.

38. *Admissible to show whether advancement was intended as satisfaction of provision by will.*—It is now well settled that parol evidence is admissible to show that a subsequent advancement by the testator was not intended as a satisfaction, in whole or in part, of a previous provision by will; and whenever such evidence is admitted for this purpose, it may be rebutted by similar evidence.—*May's Heirs v. May's Adm'r*. . . . 141
39. *Admissible in aid of record, when.*—Where the validity of a sale of land, made under an order of the orphan's court on the application of an administrator *de bonis non*, is collaterally impeached, parol evidence is admissible to prove the death of the sheriff who, *ex officio*, was the previous administrator, as a jurisdictional fact upon which the court acted in appointing the succeeding administrator.—*Doe d. Saltonstall and Wife v. Riley and Dawson*. 164
40. *Admissible to identify land, when.*—Indefiniteness and discrepancies in the description of the land, in the petition, order of sale, report of sale and commissioners' deed, will not invalidate the sale, when enough appears to show that the land sold and conveyed by the commissioners was comprehended in the description contained in the petition and order of sale; and when this is the case, parol evidence is admissible to fix the boundaries of the portion sold, according to the data furnished by the deed, so as to identify the land therein described. 164
41. *Admissible to affect consideration clause of deed, when.*—Where the consideration expressed in a deed is a certain sum of money, in hand paid, parol evidence is admissible to show that only a part of the money was paid, and that the balance was to be applied in discharge of certain debts due from the grantor to third persons.—*Hair v. Little*. 236
42. *Admissible to show that deed was not correctly recorded.*—A record copy of a lost deed, or a transcript from the record, which is declared by the statute (Clay's Dig. 155, § 25) to be "as good and effectual and available in law as if the original deed were then and there produced and proved", is only *prima facie* evidence of the contents of the deed, on the ground that all public officers must be presumed to have discharged the duties which the law requires of them; but parol evidence is admissible to show that it was not correctly recorded.—*Harvey and Wife, v. Thorpe*. 250

EVIDENCE—CONTINUED.

41. *Admissible to amend record, when.*—The general rule, which requires some matter of record, entry, or memorandum in the handwriting of the judge, to authorize an amendment of the record *nunc pro tunc*, does not apply to cases in which the entry is impeached for fraud; and though these cases generally arise collaterally, yet an entry relating to a grant of letters of administration may be amended on a direct application, of which the opposite party must have notice, setting forth the fraud specifically, and making the necessary proof.—*Dunham v. Roberts*. 236
42. *Admissible to show consideration of acceptance of written order payable out of particular fund.*—The acceptor of such an order, when sued for negligence in collecting and failure to pay when collected, may prove the consideration on which his acceptance was based; and for this purpose may show that the money collected on the judgment was paid to other persons who had prior claims on the fund, and that the balance was not collected.—*Gliddon v. McKinstry*. 408
43. *Admissible in construing will.*—In construing a will, it is permissible to look at the condition of the testator's family.—*Travis v. Morrison and Wife*. 494
44. *Admissible to show consideration of note.*—Where a promissory note is signed by the husband, with the addition of the words "acting trustee," parol evidence is admissible to show that its consideration and purpose, with the character of the transaction, constitute it a charge on the separate estate of his wife.—*Baker v. Gregory and Wife*. 544

VII. PRIMARY AND SECONDARY.

45. *Secondary evidence, different degrees of.*—The rule established by the current of American authorities, which requires a party to produce the best kind of secondary evidence that is in his power, is more reasonable than the English rule, which recognizes no degrees in secondary evidence; but wherever this rule is invoked against a party, he is permitted to show that what appears to be, is not in fact, a higher degree of secondary evidence.—*Harvey and Wife v. Thorpe*. 250
46. *Record copy of deed, conclusiveness of.*—A record copy of a lost deed, or a transcript from the record, which is declared by the statute (Clay's Dig. 155, § 25) to be "as good and effectual and available in law as if the original deed were then and there produced and proved," is only *prima facie* evidence of the contents of the deed, on the ground that all public officers must be presumed to have discharged the duties which the law requires of them; but parol evidence is admissible to show that it was not correctly recorded. 250
47. *Secondary evidence of records.*—In the absence of all evidence showing the jurisdiction of the court of ordinary in Georgia, a transcript from its records, recognizing a person as administrator, is not admissible to show a previous grant of letters to him, although the records of the court are proved to have been destroyed by fire; nor can the grant of administration, which is a judicial fact, be proved by a party's admissions on oath in another case.—*Shorter v. Urquhart*. 360

VIII. BURTHEN; WEIGHT; SUFFICIENCY.

48. *Charge upon credibility and sufficiency of evidence held erroneous.*—Where a witness for the prosecution is impeached by proof of his contradictory

EVIDENCE—CONTINUED.

- declarations on a material point, it is error to instruct the jury, "that they must believe the witness for the State, unless they believe that the contradicting witness is entitled to more weight and credit than the said witness for the State." Such a charge invades the province of the jury, who are the sole judges of the credibility and degree of credit to be accorded to each witness; and it is also objectionable, because the contradicting evidence, though less credible than the testimony of the witness for the State, may yet be sufficient to raise a reasonable doubt in the minds of the jury, and thus secure the defendant's acquittal.—*Corley v. The State*..... 22
49. *Sufficiency of evidence to authorize conviction, under bastardy act.*—It is not error to instruct the jury, at the defendant's request, "that they ought to acquit unless the proof showed beyond a reasonable doubt that he was guilty"; but it is erroneous to instruct them, "that, if the State produced a preponderance of evidence, they might upon such preponderance of proof find the defendant guilty.—*Satterwhite v. The State*..... 65
50. *Corroborating evidence must tend to show guilt.*—The testimony of a witness for the prosecution, who is shown to be unworthy of credit, is not sufficient to justify a conviction, without corroborating evidence; and such corroborating evidence, to avail anything, must be of a fact tending to show the guilt of one or both of the defendants.—*Martin and Plinn v. The State*..... 71
51. *Indictment for carrying on lottery.*—*Burthen of proving his purchase rests on defendant.*—Where evidence is adduced by the State showing that the defendant had sold tickets in a foreign lottery under such circumstances as tend to prove that he was concerned in carrying on the lottery, if the defendant wishes to protect himself on the ground that he had previously purchased such tickets, and that he had no connection with the lottery, the *onus probandi* rests on him; and if he fails to adduce any evidence of that fact, a charge which assumes that there is such evidence, or which refers to such purchase as a material fact in the cause, is abstract, and may properly be refused, although it assert a correct legal proposition.—*Salomon and Bouillemet v. The State*..... 83
52. *Issue contesting validity of will.*—*Burthen of proof.*—On the trial of an issue to test the validity of a will, the *onus* is on the proponent to show the testator's capacity and the due execution of the will; and when these facts are established, it then devolves on the contestants to show fraud or undue influence.—*Dunlap v. Robinson*..... 100
53. *Burthen of proving fraud.*—Where plaintiff and defendant both claim under purchases from the same person, by conveyances valid on their face, the party alleging fraud in the purchase of the other is bound to prove it; but when one of the conveyances is impeached for fraud, the burthen of proof is changed, and the evidence of fraud must be overcome by counter evidence of *bona fides*.—*Hair v. Little*..... 236
54. *Burthen of proving diligence or negligence.*—Where the payee of a written order, requesting the defendant to pay out of the proceeds of a certain judgment when collected, brings suit after acceptance, for the defendant's negligence in collecting and failure to pay when collected, the burthen of proving negligence is on the plaintiff, and not on the defendant to prove diligence.—*Gliddon v. McKinstry*..... 408

EVIDENCE—CONTINUED.

55. *Burthen of proof as to character of possession, in chancery.*—Where the bill alleges possession under the parol contract of sale, and the answer admits the possession, but alleges that it was acquired and held under a contract of rent, and denies the alleged contract of sale, the burthen of proof is on the complainant to prove the character of the possession. *Danforth v. Laney*!..... 274
56. *Burthen of proof as to negative averment.*—Where the bill alleges a negative, *e. g.* that complainant had no notice of the assignment of a note against which he seeks to establish an equitable set-off, and the answer avers notice, the burthen of proving notice is on the defendant, and not on the complainant to disprove it.—*Carroll v. Malone*..... 521
57. *Burthen of proving insanity or lunacy.*—The party who alleges insanity or lunacy, in avoidance of a contract, must prove it; but, when the existence of lunacy is once established, it devolves on the opposite party to prove, by testimony equally convincing, that the contract was made during a lucid interval.—*Rawdon v. Rawdon*..... 565
58. *Distinction between civil and criminal cases in measure of proof.*—In a civil action, if the plaintiff establishes a *prima facie* case, the burthen of proof is thereby shifted, and he is entitled to recover, unless his *prima facie* case is destroyed by proof from the defendant; but in a criminal case, the State being required to prove, beyond all reasonable doubt, the facts which constitute the offense, the establishment of a *prima facie* case only does not take away the presumption of the defendant's innocence, nor shift the burthen of proof.—*Ogletree v. The State*..... 693
59. *Burthen of proving alleged intent in criminal case.*—To constitute an assault with intent to murder, which is a felony by statute, it is not sufficient to prove a general felonious intent, or any other than the particular intent alleged in the indictment; the burthen of proving the alleged intent, as well as the other facts which constitute the felony, is on the State; and its actual existence is a question of fact for the jury, in the decision of which they ought to act upon those presumptions which are recognized by the law, so far as they are applicable, and their own judgment and experience, as applied to all the circumstances in evidence. 693

IX. OBJECTIONS AND MOTIONS TO EXCLUDE.

60. *When objection may be raised to irrelevant evidence.*—Irrelevant evidence may be excluded from the jury, on motion, at any time before they retire; the right to move its exclusion is not waived by failing to raise the objection when it is offered.—*Pearsall v. McCartney*..... 110
61. *Objection to entire deposition, when made.*—An objection to an entire deposition, on account of defects in the commissioner's certificate, must be made (Code, § 2328) before the trial commences, and comes too late afterwards, though made as soon as the deposition is opened by the court.—*May's Heirs v. May's Adm'r*..... 141
62. *General objection to evidence.*—A deed of conveyance, executed by the commissioners, under an order of the orphans' court, to the purchaser at their sale, is admissible evidence for a remote purchaser from him, when sued by the intestate's heir-at-law; and though the description contained in it does not correspond with the description of the land sued

EVIDENCE—CONTINUED.

- for, yet; if it embraces any portion of the land sold, a general objection to it may be overruled.—*Doe d. Saltonstall and Wife v. Riley and Daw-*
son 164
63. *Specific objection to evidence waives other objections.*—Where a specific objection is made to the admission of evidence on the trial of a cause, the party will be confined, on error, to the particular ground of objection stated in the court below, and held to have waived all other grounds of objection.—*King v. Pope* 601
64. *Demurrer to evidence, object and effect of.*—The object of a demurrer to evidence is not to substitute the judge for the jury as a trier of the facts, but to ascertain the law upon an admitted state of facts; and its effect, when issue is joined, is to admit every fact which the testimony establishes, or tends to establish: the court does not stand in the place of a jury, to render such a judgment as the jury ought to have rendered, but to render a judgment against the party demurring, if the jury could legally have done so from the evidence.—*Shaw v. White* 637
65. *Joinder in demurrer to evidence, when court may require.*—Where the evidence introduced by the plaintiff does not tend to establish his right to recover, and the defendant introduces no evidence, but demurs to the plaintiff's, the court is authorized (Code, § 2349) to require the plaintiff to join in the demurrer 637
66. *General objection to evidence, of which part is legal.*—A general objection to evidence, of which a part is legal, may be overruled entirely.—*Smith v. Causey* 655
67. *Same.*—If evidence is offered as a whole, when a portion of it is illegal, the court may, on objection, exclude the whole of it.—*Barlow v. Lambert* 704

X. QUESTIONS OF FACTS; CONCLUSIONS.

68. *Fact to which witness may depose, and which may be inferred by jury.*—Where the issue involves the application of the proceeds of collateral securities to the payment, *pro tanto*, of several debts, the amount of a debt being shown, the jury may ascertain from it as a basis the *pro rata* share to which it was entitled; or a witness may testify what the *pro rata* share was, as direct and primary evidence, without stating the amount of the debt.—*McKenzie v. Br. Bk. Montgomery* 606

EXCEPTIONS, BILL OF.

1. *Governed by what law.*—The taking of a bill of exceptions is a "proceeding" in the cause, within the meaning of the 12th section of the Code; and therefore, in actions commenced before the adoption of the Code, the bill of exceptions must be governed by the old law, although the trial is had since that time.—*Godden v. LeGrand* 158
2. *When seal necessary, and its sufficiency.*—The law which was in force before the adoption of the Code (Clay's Digest, 307; § 5) required that a bill of exceptions should be "signed and sealed" by the presiding judge; and where the bill purports to have been signed and sealed by him, but without the addition of his seal or scdöll, it cannot be regarded as any part of the record 158
3. *Exhibits must be identified by reference.*—Letters copied into the transcript

EXCEPTIONS, BILL OF—CONTINUED.

- as exhibits, but not made part of the record by appropriate reference in the bill of exceptions, cannot be considered as any part of the record.—*Stodder v. Grant and Nickels*..... 416
4. *Bill of exceptions necessary in voluntary nonsuit*.—When it becomes necessary for a plaintiff to suffer a nonsuit, on account of any decision of the court on the trial, he must (Code, § 2357) reserve the point by bill of exceptions, if he wishes to revise the action of the court, even when the ruling is otherwise disclosed by the record.—*Palmer v. Bice*..... 430
5. *Bill of exceptions construed against appellant*.—Where the bill of exceptions stated, that the slaves sued for were given to the wife of plaintiff's intestate "in the fall of 1833", and that a witness for the defendant, who stated that the slaves were delivered "in 1833", was allowed to testify, against plaintiff's objection, to declarations made by the donor "six or eight months afterwards"; held, that it would be presumed on error, in order to sustain the ruling of the primary court, that the slaves were at first delivered on loan, and that therefore the donor's declarations, tho' made "six or eight months" after the delivery, were prior to the gift "in the fall of 1833".—*Gillespie's Adm'r v. Burleson*..... 552
6. *Bill of exceptions necessary to revise decree of probate court, when*.—The appellate court will not revise any supposed error of the probate court in its decision upon facts, unless it was excepted to, or reserved in some other manner, in the primary court.—*Williams and Wife v. Gunter*..... 681

EXECUTIONS.

1. *Sheriff's duty in levying fi. fa.*—The sheriff is bound to pursue the mandate of an execution, unless otherwise instructed by the plaintiff, his attorney, or some one having an interest admitted by the plaintiff; and is not bound to determine the conflicting rights and interests which arise under an agreement, between the plaintiff in execution, under a former levy, and a statutory claimant, to the effect that a judgment of condemnation should be rendered for the agreed value of the property, and that the claimant, on paying this agreed value, should have the property: such an agreement does not, as against the sheriff, render void an *alias fi. fa.*—*Patton v. Hamner*..... 618
2. *Lien how lost*.—The lien of an execution, which has been levied on personal property, is lost, as against an intermediate mortgagee, by an order to the sheriff to postpone the sale until after the return term of the execution, and to let the property remain in the possession of the defendant without requiring bond.—*Albertson, Douglass & Co. v. Goldsby*..... 711

EXECUTORS AND ADMINISTRATORS.

1. *Construction of statute imposing costs on successful plaintiff, in action against executor or administrator, for failure to prove presentation of claim*.—Under the statute (Code, § 1887) which imposes the costs on a successful plaintiff, in an action against an executor or administrator, commenced after the death of the testator or intestate, for a failure to prove a presentation of his demand, if the defendant intends to raise the question of presentation, he must present it on the record by plea or suggestion, so that the plaintiff may have an oppor-

EXECUTORS AND ADMINISTRATORS—CONTINUED.

- tunity of proving the presentation, and the issue must be tried by the jury; but, if no such plea or suggestion is made, and the plaintiff has a general verdict on the issues joined, he is entitled to full costs.—*Wallace v. Nelson*. 282
2. *Conversion by administrator no cause of action against estate*.—When an administrator is sued in his representative character, for an alleged conversion of a slave by his intestate, proof of his possession and employment of the slave at the commencement of the suit does not authorize a recovery against him, since the estate is not responsible for his acts.—*Shorter v. Urquhart*. 360
3. *When administrator is bound to plead statute of limitations*.—An administrator is not bound to plead the statute of limitations, when he has personal assets sufficient to pay the debts; but a different rule prevails, where a resort to the realty is necessary to raise a fund for that purpose.—*Pollard v. Seears' Adm'r*. 484
4. *Bill of exchange drawn by executor no claim against estate*.—A bill of exchange drawn by G. S., with the addition of the words "executor of S. S.", is the personal contract of the drawer, and does not bind the estate; and an accommodation acceptor, who pays the bill, has no claim against the estate.—*Kirkman, Abernathy & Hanna v. Benham*. 501
5. *Confusion of debts by executor*.—If an executor, in taking a confession of judgment from a debtor to whom he has loaned the money of the estate, includes a debt due to himself individually, or to another person, this unauthorized blending of the debts creates no right against the estate; and if a succeeding representative of the estate collects a portion of the judgment, not exceeding the amount of the debt due to the estate, the other creditor, whose debt was included in the judgment, is not entitled to share in it. 501
6. *Compensation of administrator for ordinary services*.—Under the Code (§ 1823), an administrator cannot be allowed, as compensation for his ordinary services, more than two-and-a-half per cent. on his receipts, and the same per cent. on his disbursements; and additional compensation can only be allowed for actual expenses and extraordinary services.—*Newberry v. Newberry*. 691
7. *Annual settlement, effect and validity of*.—The allowance of a credit on an annual settlement of an administrator's accounts (Code, § 1823) is *prima facie* evidence in his favor on final settlement; and if no other evidence is adduced by either party, in reference to the item, than the annual settlement, it is error to disallow the credit. 691

FRAUD.

1. *Jurisdiction of equity, in cases of fraud and mistake, where remedy at law is adequate and complete*.—Equity will not entertain jurisdiction of a bill, the sole object of which is to recover money alleged to have been paid through ignorance or mistake of fact on the part of the complainant, and through fraudulent pretenses on the part of the defendant, where the remedy at law is adequate and complete.—*Russell v. Little*. 160
2. *Burthen of proving fraud*.—Where plaintiff and defendant both claim under purchases from the same person, by conveyances valid on their face, the party alleging fraud in the purchase of the other is bound to

FRAUD—CONTINUED.

- prove it ; but when one of the conveyances is impeached for fraud, the burthen of proof is changed, and the evidence of fraud must be overcome by counter evidence of *bona fides*.—Hair v. Little..... 236.
3. *What part performance avoids statute of frauds*.—Possession by the vendee, with the consent of the vendor, under a parol contract for the sale of land, takes the case out of the statute of frauds ; but mere possession, when it is not shown to be under the contract, is not sufficient.—Danforth v. Laney..... 274
4. *Burthen of proof as to character of possession*.—Where the bill alleges possession under the parol contract of sale, and the answer admits the possession, but alleges that it was acquired and held under a contract of rent, and denies the alleged contract of sale, the burthen of proof is on the complainant to prove the character of the possession..... 274
5. *Amendment of record on allegation of fraud*.—The general rule, which requires some matter of record, entry, or memorandum in the handwriting of the judge, to authorize an amendment of the record *nunc pro tunc*, does not apply to cases in which the entry is impeached for fraud ; and though these cases generally arise collaterally, yet an entry relating to a grant of letters of administration may be amended on a direct application, of which the opposite party must have notice, setting forth the fraud specifically, and making the necessary proof.—Dunham v. Roberts..... 286
6. *Allegation of fraud must be specific*.—If the motion simply states, as the ground for the amendment asked, that the record states a fact which was not proved, that as it stands it operates a fraud on the rights of the plaintiff in the motion, and that it is void in law, on account of fraud in a legal sense, the allegation is not sufficiently specific to authorize the introduction of parol evidence to prove that the fact recited was not true..... 286
7. *Laches in seeking rescission of contract on ground of fraud*.—A party who seeks the rescission of a contract, on the ground of fraud, must move within a reasonable time after the discovery of the fraud. What is a reasonable time must depend on the circumstances of each particular case. Here, a rescission was refused, because the infant, after attaining his majority, and with knowledge of the fraud, accepted from his guardian a deed for the land, remained in possession more than seven years after the sale, and more than five years after the discovery of the fraud, and showed no excuse for his delay.—Kern v. Burnham..... 428

GAMING.

See CRIMINAL LAW, 10.

GARNISHMENT.

See ATTACHMENT AND GARNISHMENT.

GIFTS.

1. *Construction of deed of gift*.—A father conveyed certain negroes and other personal property, by deed of gift, to his "daughter Sarah, and

GIFTS—CONTINUED.

- to her children, the natural heirs of her body, at her death", "to have and to hold unto the said Sarah, her executors and administrators forever, as her and her children's property"; and the deed reserved the use and possession of the property to the donor during his life: *Held*, that the deed created a life estate in the said Sarah, with a *quasi* contingent remainder to such of her children as might be living at her death.—*Elmore v. Mustin* 309
2. *Delivery as part of parol gift*.—While delivery is an indispensable constituent of a parol gift, it is not indispensable that it should be simultaneous with the words of conveyance.—*Gillespie's Adm'r v. Burleson* 552
3. *Admissibility of donor's declarations*.—The declarations of the donor, made previous to the consummation of the gift, but while it was under consideration and discussion by him, and in reference to and contemplation of it, and explanatory of his intention, are competent evidence in a suit involving the title; his declarations at the time of delivery, and in explanation thereof, are also admissible as part of the *res gestæ*; but his declarations after the consummation of the gift are inadmissible, either for the purpose of affecting the gift, or explaining his words or conduct at the time of the gift. 552
4. *Gift of money, facts held not sufficient to show*.—In an action to recover money loaned, plaintiff proved that her grand-father, with whom she was then living, loaned the money to defendant, and took his note payable to her; that he stated, at the time, that the money was his, but that he intended it for plaintiff, at his death, if she remained with him until that time, and pleased him; that she afterwards married, and left her grand-father's house; and that he subsequently went to defendant, gave him up the note, (which defendant then destroyed,) and took another note payable to himself: *Held*, on demurrer to this evidence, that it showed no right of recovery in plaintiff.—*Shaw v. White*. 637
5. *Parol gift—Delivery and retention of possession*.—Although an actual delivery is indispensable to perfect a parol gift of a slave, yet it is not necessary that the actual possession should be afterwards retained by the donee: subsequent possession by the donor is not necessarily incompatible with the donee's dominion over the property, nor is it conclusive evidence that there was no delivery, or that the dominion did not pass to the donee.—*Ivey's Adm'r v. Owens and Wife*. 641
6. *Donor's subsequent possession explained*.—Although the donor's subsequent possession, when the donee is twenty-one years of age, is not necessarily explained by the single fact that his home is also the home of the donee; yet where the donee is the daughter of the donor, and lives with him as a member of his family, and the slave is too young to be a source of profit or active service, or to be permanently separated from a family of slaves belonging to the donor,—these facts, *prima facie*, are a sufficient explanation of the donor's subsequent possession and control of the slave, although the donee is over twenty-one years of age. 641
7. *What constitutes delivery*.—If a parent places the hand of a slave in the hand of his daughter, declaring at the time that he gives the slave to her, and this is done with the intention thereby to create and con-

GIFTS—CONTINUED.

summate a parol gift, the dominion over the slave passes to the donee, and the gift is complete. 641

HUSBAND AND WIFE.

1. *When wife, on desertion by husband, may prosecute or defend actions in his name.*—Under section 2136 of the Code, which authorizes "the wife and mother," who has been deserted by her husband, to prosecute or defend, in his name, any action which he might have prosecuted or defended, it must appear that the wife is also a mother, and the husband a father; and if the husband is a non-resident at the commencement of the suit, security for the costs must be given before the issue of the summons, as in other cases where the plaintiff is a non-resident.—*Ex parte Cole*. 50
2. *Wife's right to dispose by will of her separate estate.*—Where there is an agreement between husband and wife, before marriage, that she shall have either the whole or a particular part of her personal property to her separate use, she may dispose of it by will, without the consent of her husband.—*Wells v. Bransford*. 200
3. *Ante-nuptial agreement established on secondary evidence.*—In this case, the probate of the wife's will being resisted by the husband, the execution of an ante-nuptial agreement between them was established on the testimony of two witnesses, who had often seen and read it, in connection with evidence of the husband's subsequent declaration that he had burned it; although there was evidence of the wife's declarations, to several persons, that there never was any marriage contract between her and her husband; and although the witnesses who testified to its existence could not recollect the language of it, and did not agree as to its precise terms. 200
4. *Wife's right of survivorship.*—The husband's marital rights do not attach, so as to defeat the wife's right of survivorship, to property which is in the actual and rightful possession of another, and of which he cannot obtain possession during the coverture without becoming a trespasser.—*Hair v. Avery*. 267
5. *Wife's right to slave purchased by husband, in his own name, with money belonging to her separate estate.*—If the husband purchase a slave in his own name, and take the bill of sale to himself, the legal title vests in him, although the purchase money was the proceeds of the sale of property in another State secured to the wife by ante-nuptial agreement there executed; and though he may deliver the slave to the wife, and recognize it as hers, yet she cannot interpose a claim at law, in her own name, when the slave is taken under attachment against the husband.—*Irons v. Reynolds*. 305
6. *Mortgage by husband of wife's land.*—If the husband, during coverture, and after issue born, execute a mortgage of his wife's land, the deed conveys all his interest as husband and tenant by the curtesy initiate.—*Boykin v. Rain*. 332
7. *Husband's right to wife's chattels.*—In this State, prior to the passage of the several statutes securing to married women their separate estates, if slaves were bequeathed to one person for life, with a vested

HUSBAND AND WIFE—CONTINUED.

remainder to a married woman and others as tenants in common, and, with the assent of the executor, went into the possession of the person having the life estate, the interest of the wife vested in the husband, no adverse possession being shown, and he became tenant in common with the remainder-men.—*Walker v. Feñner*..... 367

8. *Reduction to possession by husband*.—Where slaves are bequeathed to a married woman, by words which do not create a separate estate in her, and are delivered to her by the executor, as her separate property, with the consent of her husband, who thenceforward until his death recognizes and treats them as belonging to his wife, and asserts no claim in himself,—this is not a reduction to possession as husband, and his marital rights do not attach.—*Machem v. Machem*..... 374

9. *Mistake no excuse for failure to reduce to possession*.—If the husband fail to reduce to possession during the coverture, slaves bequeathed to his wife, because he erroneously supposed that the will created a separate estate in her, his mistake does not avoid the effect of the failure, and his marital rights do not attach..... 374

10. *Agreement to make settlement*.—Where the husband agrees to settle property on his wife, the law implies that it was intended for her sole and separate use.—*Andrews v. Andrews*..... 432

11. *When equity will sustain and enforce post-nuptial voluntary settlement in favor of wife*.—Equity will sustain a post-nuptial voluntary settlement in favor of the wife, when executed, and will specifically enforce, as against any other person than the party himself, an agreement to make such a settlement; but it will not specifically execute such an agreement against the party himself, because, until executed, it is revocable..... 432

12. *Removal of husband as trustee*.—Where the wife files a bill against her husband to compel the specific execution of an agreement to make a settlement on her, and does not allege that she is separated from him on account of his improper conduct, or that he intends to remove from the State without her, or that she has reasons to apprehend a denial of her right to the property settled on her by the court, or that his habits are such as render him incapable of or unfit for the discreet and proper management of the estate, the court will not appoint another trustee in his stead, nor forbid his interference with the property..... 432

13. *Statute of distribution (Code, § 1990), as to separate estates of married women dying intestate, construed*.—The provisions of the Code (§§ 1990, 1997), regulating the distribution of the separate estate of a married woman dying intestate, do not apply to separate estates created by deed before the 1st March, 1848, although the marriage took place after that day; and the husband, in such case, takes nothing under the statute.—*Willis v. Cadenhead*..... 472

14. *What will create charge upon wife's separate estate*.—If an adult married woman, having a separate estate secured to her by ante-nuptial contract, without any restriction upon her power to charge or dispose of it, authorize her husband, as her acting trustee, with the intention thereby to charge her separate estate, to execute a note to a third person, for the amount expended by him, without obligation, but

HUSBAND AND WIFE—CONTINUED.

- at the request of her brother-in-law who afterwards became her husband, in maintaining and educating her while a poor orphan child; and her husband accordingly executes the note, signing his name, with the addition of the words "acting trustee"; and the note is then accepted by the payee, as a charge upon her separate estate,—a court of equity will enforce it as such.—*Baker v. Gregory and Wife*. 544
15. *Such charge transferrable*.—A promissory note, which was executed under such circumstances as to constitute it a charge upon the separate estate of a married woman, may be enforced in equity by a transferee or endorsee against her estate. 544
16. *Contract of wife having separate estate, effect of*.—Although the wife's promissory note, even when she has a separate estate, creates no personal liability on her; yet, if there is no restriction on her power to charge or dispose of it, she may charge her estate with the payment of her husband's debt, by any promise or contract which, if she were sole and unmarried, would bind her personally. 544
17. *Admissibility of wife's declarations of title*.—Where slaves are in the possession of husband and wife, the wife's assertions of title, when made in the presence of her husband, and acquiesced in by him, are competent evidence against his administrator, in a suit brought by the latter against her vendee; but her assertions of title, when not made in the presence of her husband, nor communicated to him, are not competent evidence for her vendee, unless made while she had possession of the slaves, and explanatory of her possession.—*Gillespie's Adm'r v. Burleson*. 552
18. *Separate estate may be created by parol*.—A parent may, by a parol gift of slaves to his married daughter, create in her a separate estate, and exclude her husband's marital rights. 552
19. *What words are insufficient to create separate estate*.—A stipulation, in a gift of slaves to a married woman, that they shall not be liable to her husband's debts, is not, of itself, sufficient to exclude his marital rights and create a separate estate in her. 552
20. *What does not constitute reduction to possession by husband*.—Where slaves are given by parol to a married woman, who thenceforward, during her husband's life, uniformly asserts title and possession in herself, to her sole and separate use, to which assertions of title her husband uniformly assents,—this is no reduction to possession as husband; but, as between his administrator and a purchaser from his widow after his death, his marital rights never attached. 552
21. *Husband's declarations in disparagement of title*.—The declarations of the husband, while in possession of slaves, to the effect that they are the separate property of his wife, are competent evidence against his administrator, in a suit brought by him against a purchaser from the wife after the death of the husband. 552
22. *Wife's separate estate may be charged by verbal or implied promise*.—If a married woman, owning a steam saw-mill as part of her separate estate, hires slaves to work in and about it, her separate estate may be subjected in equity to the payment of the hire, although no note was given for it; and if the slaves run away during the term of hiring, and

HUSBAND AND WIFE—CONTINUED.

are committed to jail as runaways, and she knowingly permits them to remain in jail until after the expiration of the term, the owner is entitled to reimbursement out of her separate estate, for the amount of jail fees necessarily paid by him, after the expiration of the term, in order to regain the possession of the slaves.—*Walker and Wife v. Smith*. 569

23. *Husband incompetent witness for wife*.—The rule which renders husband and wife, unless in a few excepted cases, incompetent to testify for or against each other, has its foundation not only in the identity of their legal rights, but in a wise public policy; and there is nothing in any of the statutes of this State, securing to married women their separate estates, which requires that an exception should be made of cases in which the husband is called upon to testify to his acts in the capacity of trustee for his wife.—*Wilson v. Sheppard*. 623
24. *Wife's right to property purchased by husband with her separate funds*.—If the husband purchases property with money belonging to his wife's separate estate, other than the income or profits thereof, and takes the title in his own name, the law will compel him, at the instance of his wife, to convey the property to her; and therefore, if he voluntarily conveys it to her, though for the purpose of preventing his creditors from taking it in payment of his debts, his conveyance will be sustained. 623

See DIVORCE.

INFANTS.

1. *How non-resident infant defendants may be made parties*.—Non-resident infant defendants, whose father is dead, and whose mother is a non-resident, may be made parties to a bill by publication, and sending a copy of the order to their mother, with whom they live, at her known place of residence; but sending a copy of the order to *Elizabeth Lewis*, "as the mother of said infants," when their mother's name is shown by the record to be *Mary A. Lewis*, is not a compliance with the rule.—*Clark v. Gilmer*. 265
2. *Decree reversed for error prejudicial to infant defendants*.—When non-resident infant defendants are not properly brought in as parties, the decree will be reversed by the appellate court, and the cause remanded, although the error escaped the notice of the solicitors and chancellor in the court below, and was not specially assigned as error. 265
3. *What consideration will support promise to pay by infant after becoming of age*.—If a stranger, without obligation, expends his own funds in maintaining and educating an orphan child, who meanwhile becomes entitled to a large estate, out of which no allowance for her maintenance or education is applied for or made, this is a sufficient consideration to support an express promise on her part, after coming of age, to repay him the amount so expended; and if such expenditure is made at the request of her brother-in-law, who thereby becomes liable for its amount, this liability on his part is a sufficient consideration to support an express promise on her part, after coming of age, to indemnify him against any loss he might thereby sustain.—*Baker v. Grégory and Wife*. 544

INSANITY.

See DIVORCE, 10, 11, 12.

INSURANCE.

1. *Construction of policy.*—A provision in a policy, that "property held in trust, or on commission, must be insured as such, otherwise the policy will not cover it," includes everything in which the insured has only a qualified interest, with the possession, while the ownership is in a third person.—Turner v. Stetts, Allen & Gilf. 420

JOINT TENANTS.

1. *Waiver of right of survivorship.*—Where an administrator and the surviving sister of his intestate, as tenants in common, join in a bill for the recovery of slaves bequeathed by the maternal grandfather of the sisters to their mother and her children, and sold under execution against their father, the surviving sister thereby waives her right of survivorship, if any she had; and the defendant cannot raise the objection, that the will created a joint tenancy, and that therefore there was a misjoinder of complainants.—Hair v. Avery. 267

JUDGMENTS AND DECREES.

1. *Validity of foreign decree of divorce rendered on publication.*—The general principle, that judgments and decrees, when set up in a different State from that in which they were rendered, may be avoided, when the court had no jurisdiction of the defendant's person and there was no appearance, does not apply to decrees of divorce rendered on publication against non-resident defendants, the validity of which depends on the statutes of the State in which they were rendered, and results necessarily from the existence of the jurisdiction.—Thompson v. The State. 12
2. *What would render void foreign decree of divorce.*—A decree of divorce obtained in Arkansas, by a person domiciled in Alabama, would be void, and would constitute no defence to a prosecution in Alabama for polygamy, if the decree was procured by fraud, or if the defendant did not go to Arkansas *animo manendi*, or if he went thither merely for the purpose of obtaining a divorce, and with the intention of remaining no longer than was necessary to accomplish that purpose. 12
3. *Amendment of judgment nunc pro tunc.*—A recital in a judgment *nunc pro tunc*, that sufficient matter to authorize its rendition was disclosed to the court "by sufficient, competent, and satisfactory evidence," will sustain the judgment, if the parties appear to the motion, and do not show, either by bill of exceptions or in some other appropriate manner, that the recital is untrue.—Price & Simpson v. Gillespie. 279
4. *Amendment of record on allegation of fraud.*—The general rule, which requires some matter of record, entry, or memorandum in the handwriting of the judge, to authorize an amendment of the record *nunc pro tunc*, does not apply to cases in which the entry is impeached for fraud; and though these cases generally arise collaterally, yet an entry relating to a grant of letters of administration may be amended on a direct application, of which the opposite party must have notice, setting forth the fraud specifically, and making the necessary proof.—Dunham v. Roberts. 286
5. *Allegation of fraud must be specific.*—If the motion simply states, as the ground for the amendment asked, that the record states a fact which

JUDGMENTS AND DECREES—CONTINUED.

- was not proved, that as it stands it operates a fraud on the rights of the plaintiff in the motion, and that it is void in law, on account of fraud in a legal sense, the allegation is not sufficiently specific to authorize the introduction of parol evidence to prove that the fact recited was not true. 286
6. *Lien of judgments on land*.—The provision of the Code (§ 2456), which makes a judgment a lien on the real estate of the debtor only from the time of the delivery of an execution to the sheriff, applies to judgments rendered before its adoption.—*Daily v. Burke*. 328
7. *Judgment not "proceeding", under 12th section of Code*.—The term "proceeding", as used in the 12th section of the Code, which declares that "no action, or proceeding", commenced before its adoption, shall be affected by any of its provisions, does not include a judgment, which is an entire act,—an act which cannot, in any proper sense, be said to be "commenced" before a certain day 328
8. *Decree of divorce, effect of*.—A decree of divorce, *a vinculo*, in favor of the wife, defeats and determines all the rights and interest of her husband in and to her lands, and of others claiming under a mortgage executed by him, and restores her rights precisely as her husband's death would have restored them.—*Boykin v. Rain*. 332
9. *Judgment on petition for rehearing in action at law*.—If the trial of the petition results adversely to the petitioner, he cannot have a re-hearing of the original cause; but if the trial results in his favor, the proper judgment is, that the judgment rendered in the original action be vacated, that the execution issued under it be quashed, that a re-hearing be granted in the original action, that the petitioner be let in to make his defense in that action, and that he recover of the plaintiff in that judgment the costs which have accrued on the petition for re-hearing.—*Pratt & McKenzie v. Keils & Sylvester*. 390
10. *Judgment against garnishee corrected and affirmed*.—Where the affidavit for the garnishment is made by the real owner of the judgment of which satisfaction is sought, and judgment is rendered in his name against the garnishee, while the affidavit and garnishment correctly describe the original judgment, the judgment will be corrected in the appellate court, at the costs of the appellant, and rendered in the name of the plaintiff in the original judgment.—*Jackson v. Shipman*. 488
11. *Decree of foreclosure, conclusiveness and effect of*.—The effect of a decree of foreclosure under a mortgage is not so extensive as that of a decree in a proceeding *in rem*: it does not prejudice the rights of those who ought to be, but are not parties. If the mortgagor dies before the rendition of the decree, and the suit is thereupon revived against his administrator and sole devisee, and not against his heirs, the decree of foreclosure, and the complainant's purchase of the premises at the master's sale, are both void, as against the heirs of the mortgagor, if they set aside the probate of their ancestor's will, by bill in chancery, within the time allowed by the statute.—*Hunt and Frowner v. Acre and Johnson*. 580
12. *Decree in chancery annulling probate of will, conclusiveness and effect of*.—A bill in chancery to set aside and annul the probate of a will is in the

JUDGMENTS AND DECREES—CONTINUED.

- nature of a proceeding *in rem*, to which any person having an interest may make himself a party; and the decree, annulling the probate, is final and conclusive, as to the validity of the will, in all courts and upon all persons, until set aside or reversed in some direct proceeding..... 580
13. *Annual settlement, effect and validity of.*—The allowance of a credit on an annual settlement of an administrator's accounts (Code, § 1823) is *prima facie* evidence in his favor on final settlement; and if no other evidence is adduced by either party, in reference to the item, than the annual settlement, it is error to disallow the credit.—*Newberry v. Newberry.* 691

JURISDICTION.

1. *Jurisdiction of courts of husband's domicile to grant divorce.*—The husband has a right to emigrate and acquire a new domicile, and thereby acquires, as a consequence, the right of having his matrimonial *status* controlled by the laws and judicial tribunals of the country of his new domicile, although his wife remains in the State which he left.—*Thompson v. The State*..... 12
2. *When recitals in decree may be looked to.*—Although recitals in the decrees of courts of limited jurisdiction cannot give jurisdiction; yet, where the jurisdiction otherwise appears, the decree may be looked to for the purpose of ascertaining whether the action of the court, in ordering a sale of lands, was predicated upon the two petitions separately shown in the record, or whether, as might have been done, one was regarded as amendatory of the other, and the two considered as but one application.—*Doe d. Saltonstall and Wife v. Riley and Dawson*..... 164
- See CHANCERY, 3, 5, 7, 15, 16, 17, 18.
CIRCUIT COURT, 1.
PROBATE COURT, 1, 2, 4.
SUPREME COURT, 1.

JURORS.

1. *Challenge of juror for cause on account of fixed opinion against capital or penitentiary punishment.*—On the trial of a person under an indictment for an offence which may be punished capitally or by confinement in the penitentiary, it is a good challenge for cause by the State that a juror has a fixed opinion against capital or penitentiary punishments.—*Stalls v. The State*..... 25
2. *Right to challenge for this cause may be lost, and, when lost, cannot be revived.*—If the juror is accepted by the State, and afterwards by the prisoner, the State's right of challenge for this cause is lost, and cannot be again revived by any act of either the solicitor or the court, against the objection of the prisoner, although the existence of the cause of challenge was unknown to the solicitor and court when the juror was accepted by the State..... 25
3. *Setting aside juror for cause of challenge, after acceptance, reversible error.*—If the court improperly set aside a juror for a cause of challenge on the part of the State which has been lost by previously accepting him, and the prisoner excepts to its decision, the error entitles him to a reversal of the judgment of conviction..... 25

LACHES.

1. *Laches in seeking rescission of contract fatal to relief.*—A party who seeks the rescission of a contract, on the ground of fraud, must move within a reasonable time after the discovery of the fraud. What is a reasonable time must depend on the circumstances of each particular case. Here, a rescission was refused, because the infant, after attaining his majority, and with knowledge of the fraud, accepted from his guardian a deed for the land, remained in possession more than seven years after the sale, and more than five years after the discovery of the fraud, and showed no excuse for his delay.—*Kern v. Burnham*..... 428
2. *Same.*—A bill for the rescission of a contract of purchase of land, on the ground of the vendor's false representations, was filed thirteen or fourteen years after the discovery of the fraud, and, although it alleged that the complainant abandoned the land on the discovery of the fraud, showed no act on his part which would have precluded him from enforcing the specific execution of the contract, if a favorable fluctuation in the price of the land had made it his interest to do so; and the laches was held fatal to the relief, on demurrer for want of equity.—*Askew v. Hooper*..... 634
3. *Same.*—The lapse of twenty-two years after the discovery of the alleged insanity, before filing bill to avoid marriage on that ground, is a bar to the relief sought.—*Rawdon v. Rawdon*..... 565

LANDLORD AND TENANT.

1. *Lease by tenant at will, validity of.*—The general doctrine, that the making of a lease by a tenant at will terminates his tenancy, and converts him into a disseisor, must be understood with this qualification, that it has that effect only at the election of the landlord, and that the tenant cannot avail himself of it to avoid the payment of the rent.—*Cook v. Cook*..... 660
2. *Tenancy at will, how determined.*—To determine a tenancy at will, by the landlord's entering upon the land, and there by words declaring it an end, it is necessary that the tenant should have notice of such words..... 660
3. *Estoppel against tenant from denying landlord's title.*—Where the tenant has enjoyed the undisturbed possession of the land during the period of the lease, he is estopped, in any proceeding for the recovery of rent, from denying the landlord's title..... 660

LEGACIES.

See WILLS.

LIEN.

See EXECUTIONS, 2.

JUDGMENTS AND DECREES, 6.

LIMITATIONS, STATUTES OF.

1. *Summary proceeding against steamboat for violation of registration act.*—The provision contained in the second section of the act of 1854, "to provide for the registration of the names of steamboat

LIMITATIONS, STATUTES OF—CONTINUED.

- owners", which gives a remedy against the boat by admiralty process, "in the same manner as is provided by the laws of this State for the recovery for work and materials furnished steamboats," refers only to the form and mode of conducting the proceeding, but does not limit the suit to thirty days after the accrual of the cause of action. The limitation of the suit is one year, as prescribed by section 2481 of the Code.—*Commissioners of Pilotage v. Steamboats Cuba, Swan, and J. H. Bell* 185
2. *Exceptions to statute prescribed by Code.*—A suit commenced within one year from the time the Code went into operation, on a cause of action subsisting at the time of its adoption, is expressly exempted (Code, § 2502; Pamphlet Acts 1853-4, p. 71) from the influence of its provisions as to the limitations of actions.—*Bettis v. Saint* 214
3. *When administrator is bound to plead statute.*—An administrator is not bound to plead the statute of limitations, when he has personal assets sufficient to pay the debts; but a different rule prevails, where a resort to the realty is necessary to raise a fund for that purpose.—*Pollard v. Scears' Adm'r.* 484
4. *How applied in equity.*—The statute of limitations applicable to actions at law is not binding on the chancery court, in cases of exclusively equitable cognizance; but that court, besides refusing to interfere where there has been gross laches, or a long or unreasonable acquiescence in the assertion of adverse claims, often adopts, in cases to which the statute of limitations does not strictly apply, a period within which its aid must be sought, similar to that prescribed in analogous cases at law.—*Askew v. Hooper* 634
5. *Assumpsit.*—Where a party has the right to bring either trover for the conversion of his slave, or assumpsit for the proceeds of sale, and elects to proceed in the latter action, the statute of limitations begins to run from the time that cause of action accrued, and the fact that the other remedy is barred does not defeat the action.—*Ivey's Adm'r v. Owens and Wife* 641
6. *Limitation of appeal.*—On motion to dismiss the appeal in this case, because it was not taken within six months after the rendition of the decree, (Code, §§ 1888, 2039,) the court said, that the question was one of difficulty and importance, and declined to consider it, because its decision could not affect the result of the case.—*Williams and Wife v. Gunter* 682
7. *Same.*—A valid appeal cannot be taken, without giving bond, or security for costs, within the period prescribed by the statute of limitations governing appeals; when application is made for an appeal within the prescribed period, but no bond, or security for costs, is given until after its expiration, the appeal will be dismissed on motion.—*Mays v. King* 690
8. *Promise made on Sunday does not avoid statute of limitations.*—A subsequent promise to pay a debt, whether express or implied, if made on Sunday, does not take the case out of the statute of limitations.—*Bumgardner v. Taylor* 687

LOTTERIES.

See CRIMINAL LAW, 22, 23, 24.

MANDAMUS.

1. *Does not lie, in criminal case, on refusal of change of venue.*—The granting of an application for a change of venue in a criminal case (Code, §§ 3608, 3609) is discretionary with the court to which the application is made, and its refusal is not revisable in the appellate court by *mandamus* or otherwise. (Rice, C. J., *dissenting*.)—*Ex parte Banks* 28
2. *Lies to compel dismissal of suit brought by non-resident without giving security for costs.*—If a suit is brought by a non-resident without first giving security for the costs, and the court overrules the defendant's motion to dismiss it for that reason, a *mandamus* will be awarded by the appellate court to compel the dismissal, when no final judgment has been rendered in the cause.—*Ex parte Cole* 50

MARRIAGE.

See DIVORCE.

MISTAKE.

See CHANCERY, 3.

ERROR, 6.

HUSBAND AND WIFE, 9.

MORTGAGES AND CONDITIONAL SALES.

1. *Existing debt necessary to constitute mortgage.*—A conveyance made in satisfaction of a precedent debt, although it may contain a redemption clause, cannot take effect as a mortgage, since a mortgage is impossible where no debt exists.—*West and Wife v. Hendrix* 226
2. *Agreement to re-sell does not make absolute deed mortgage.*—When a deed is made for a consideration paid at the time,—whether the payment is made in cash, or by the surrender and satisfaction of a precedent debt,—an agreement on the part of the vendee to allow the vendor to purchase at a future day, for the same or for an advanced price, does not convert the transaction into a mortgage 226
3. *Concurrent intention necessary to constitute mortgage.*—To convert a conveyance, absolute in its terms, into a mortgage, the intention and understanding of both parties to that effect must concur; the fact that the party who executed the conveyance intended and considered it as a mortgage, is not sufficient to make it a mortgage. 226
4. *Inadequacy of price insufficient.*—Inadequacy of price or consideration, of itself, is not sufficient to convert an absolute conveyance into a security for the re-payment of money 226
5. *Absolute deed, with bond conditioned to reconvey, held conditional sale, and not mortgage.*—Where S. executed to H. an absolute conveyance for a tract of land, reciting therein a money consideration in hand paid, and took from him a receipt in full of an account held by him against W. for the same amount; and H. at the same time executed to S. a penal bond, which recited the sale, and was conditioned that he should "re-convey"

MORTGAGES AND CONDITIONAL SALES—CONTINUED.

- the land on the payment, by a specified day, of a sum of money equal to the amount of the expressed consideration with interest: *Held*, that the transaction, as evidenced by the deed and bond, was not a mortgage, but a sale with an agreement to re-sell on the payment by the specified day of the stipulated amount; and that the contemporaneous declaration of H., as proved by the subscribing witness, that the transaction was intended as a security for his debt against W., and his subsequent declarations that the debt was still subsisting, together with the facts that the land was worth nearly three times as much as the amount expressed as the consideration, and that S. retained the possession of it without any agreement to pay rent, were not sufficient to convert it into a mortgage. 226
6. *Mortgage by husband of wife's land*.—If the husband, during coverture, and after issue born, execute a mortgage of his wife's land, the deed conveys all his interest as husband and tenant by the curtesy initiate.—*Boykin v. Rain* 332
7. *Decree of foreclosure, conclusiveness and effect of*.—The effect of a decree of foreclosure under a mortgage is not so extensive as that of a decree in a proceeding *in rem*: it does not prejudice the rights of those who ought to be, but are not parties. If the mortgagor dies before the rendition of the decree, and the suit is thereupon revived against his administrator and sole devisee, and not against his heirs, the decree of foreclosure, and the complainant's purchase of the premises at the master's sale, are both void, as against the heirs of the mortgagor, if they set aside the probate of their ancestor's will, by bill in chancery, within the time allowed by the statute.—*Hunt and Frowner v. Acre and Johnson*. 580
8. *Proper parties to bill of revivor in foreclosure suit*.—In a suit for the foreclosure of a mortgage, if the mortgagor dies before the rendition of the final decree, and his will is admitted to probate by the court having jurisdiction, his heirs-at-law, as well as his personal representatives and devisees, are proper parties to the bill of revivor, and the complainant proceeds without them at his peril, since they have the statutory right to impeach the probate of the will, by bill in chancery, at any time within five years. 580
9. *Usury a defense to suit for foreclosure of mortgage*.—Usury in the transaction in which the mortgage had its origin, may be set up as a defense, *pro tanto*, to a bill for foreclosure; and its effect, if established, is to discharge the party from the payment of any interest whatever on the debt 580

NON-CLAIM, STATUTE OF.

1. *Construction of statute imposing costs on successful plaintiff, in action against executor or administrator, for failure to prove presentation of claim*.—Under the statute (Code, § 1887) which imposes the costs on a successful plaintiff, in an action against an executor or administrator, commenced after the death of the testator or intestate, for a failure to prove a presentation of his demand, if the defendant intends to raise the question of presentation, he must present it on the record by plea or suggestion, so that the

NON-CLAIM, STATUTE OF—CONTINUED.

- plaintiff may have an opportunity of proving the presentation, and the issue must be tried by the jury; but, if no such plea or suggestion is made, and the plaintiff has a general verdict on the issues joined, he is entitled to full costs.—*Wallace v. Nelson* 282
2. *What constitutes a bar under statute of non-claim prescribed by Code.*—A bar to a claim against an estate cannot be made out, under the statute of non-claim prescribed by the Code (§ 1883), by uniting the time which elapsed before the Code went into effect, with the time which elapsed after that event.—*McHenry v. Wells* 451
3. *What constitutes a bar under statute of 1850.*—Under the act of 1850, (Pamphlet Acts 1849–50, p. 68,) a claim against an estate was barred, by the failure to present it to the personal representative, or to file it in the office of the probate judge, not within eighteen months from the grant of letters testamentary or of administration, but within eighteen months after the publication of notice by the executor or administrator. 451
4. *What is sufficient presentation of claim.*—At a meeting between the administrator and several of the distributees of an estate, two of whom claimed to hold debts against the deceased, the account in reference to the transaction out of which the claims arose was stated in writing, with the assistance of the administrator, who then asked one of them, "if that item was all he claimed"; to which the latter replied, "that it was all they claimed": *Held*, that this was a sufficient presentation to avoid the statute of non-claim.—*Pollard v. Sears' Adm'r* 484

NONSUIT.

See BILL OF EXCEPTIONS, 4.

PARTITION FENCES

1. *Right to repair partition fence.*—Where there is a partition fence between two adjacent land proprietors, or a fence which, although built entirely on the land of one, is recognized by both as a partition fence, each one has a right to enter on the land of the other for the purpose of repairing it.—*Henry v. Jones* 385
2. *Right to repair gives no right to destroy.*—If a gate, erected on the land of one proprietor, is also recognized as a part of the partition fence between him and the adjacent proprietor, the right to repair it as a fence does not authorize its destruction as a gate; and an entry for the latter purpose is not protected by the statute. 385

PARTNERSHIP.

1. *What constitutes partner quoad third persons.*—On the formation of a partnership for the purpose of speculating in Indian lands, certain rules and regulations were adopted, at a meeting of the company, by which the number of shares was fixed, and his interest assigned to each partner; and by which it was required, that a specified sum should be paid on each share,—that relinquishments should be executed to the company, of all interests in any of the lands embraced in their contract; that any service should be performed for the company, in furtherance of its

PARTNERSHIP—CONTINUED.

- business, when called upon by a resolution of the company; and that a failure to comply with any of their requisitions, or any violation of good faith to the interest of the company, should forfeit to the company the interest of the person so offending: *Held*, that a person to whom an interest in the company was assigned at this meeting, and who assented within a reasonable time afterwards to take it, was liable as a partner, at least *quoad* third persons who afterwards dealt with the company, although he was not present at the meeting, did not pay the installment on the share assigned to him, did not execute the relinquishments, and did not perform any of the services required by the rules and regulations.—*Grady v. Robinson*..... 289
2. *Relinquishment by partner, without notice, no discharge of liability to third persons.* A relinquishment by one ostensible partner to another, of all his interest in the partnership, does not discharge him from liability as a partner to third persons who afterwards deal with the company without notice of such relinquishment..... 289
3. *Partner's authority to bind firm by sealed instrument.*—A sealed instrument, executed by one partner in the name of the firm, under a prior verbal authority, or subsequently verbally ratified, is binding on the firm.... 289
4. *Allowance to surviving partner for expenses in settling business of partnership.*—Where the business of a trading partnership is continued for a considerable length of time after the death of one of the partners, whose personal representative, in seeking a settlement of the partnership accounts in equity, elects to have a report and decree of the profits which accrued during that time, the surviving partner is entitled, at least, to an allowance and deduction for "tavern bills and other expenses incurred in the adjustment and settling up" of the affairs of the partnership.—*O'Reilly's Adm'r v. Brady*..... 530
5. *Jurisdiction of equity to enforce payment of partnership debt out of estate of deceased partner.*—A court of equity had original jurisdiction to enforce the payment of a partnership debt out of the estate of a deceased partner, and that jurisdiction is not taken away by any provision of the Code of Alabama.—*Waldron, Isley & Co. v. Simmons*..... 629
6. *Section 2142 of Code, in reference to suits against partners, construed.*—Section 2142 of the Code, which provides that one partner, or his legal representatives, "may be sued for the obligation of all," provides a plain and adequate remedy at law to enforce the payment of a partnership debt out of the estate of a deceased partner, but does not take away the original jurisdiction of equity in such cases..... 629

PHYSICIANS.

1. *Diploma of physician, when admissible evidence.*—In an action on an open account for services rendered as a physician, a diploma from a medical college would be admissible evidence, if the services were rendered since the passage of the act of 1854, (Pamphlet Acts 1853-4, p. 48,) "to allow all regular graduates of any medical college in the United States to practice medicine"; but, since that act cannot retro-act so as to authorize a recovery for medical services rendered before its passage, and since the Code

PHYSICIANS—CONTINUED.

- (§ 977) prohibits a recovery for services rendered by a physician who has not obtained a license from one of the medical boards of this State, a diploma would confer no authority to practice medicine before the passage of the act of 1854, and would therefore not be competent evidence to sustain an action for such services.—*Richardson v. Dorman's Executrix*..... 679
2. *Entries on physician's books evidence of what facts.*—The original entries in the books of a physician, which are declared by the Code (§ 2298) to be "evidence for him, in actions for the recovery of his medical services, that the service was rendered", are evidence of the items of his account for medicines administered and furnished to his patients in the course of his practice; but the value of the medicines, as well as of the active services rendered, must be otherwise proved..... 679

PLEADING AND PRACTICE AT LAW.

1. *Power of court over proceedings in fieri.*—Where the trial and conviction occur at the term at which the indictment was found, the court may, at any time during that term, as well after as before conviction, cause the clerk to endorse the indictment "filed", to date the endorsement according to the fact, and sign it; and may also cause an entry to be made on the minutes, that the indictment was returned into court by the grand jury, with the day on which it was so returned. Over such matters the court has control during the term, and may alter, amend, or set them aside, as justice may require.—*Franklin v. The State*..... 9
2. *Right to open and conclude argument.*—The defendant in the judgment, who applies for the *supersedeas*, is the plaintiff in the proceedings subsequently had on his petition, and is therefore entitled to open and conclude the argument.—*Pearsall v. McCartney*..... 110
3. *Construction of statute imposing costs on successful plaintiff, in action against executor or administrator, for failure to prove presentation of claim.*—Under the statute (Code, § 1887) which imposes the costs on a successful plaintiff, in an action against an executor or administrator, commenced after the death of the testator or intestate, for a failure to prove a presentation of his demand, if the defendant intends to raise the question of presentation, he must present it on the record by plea or suggestion, so that the plaintiff may have an opportunity of proving the presentation, and the issue must be tried by the jury; but, if no such plea or suggestion is made, and the plaintiff has a general verdict on the issues joined, he is entitled to full costs.—*Wallace v. Nelson*..... 282
4. *Waiver of irregularities by failing to object.*—If a writ be sued out against two administrators, and the suit discontinued in the declaration as to one, on whom process was not served, on the ground of non-residence, the other defendant, if he appear and defend without objection, cannot avail himself of the irregularity (if any) on error.—*Shorter v. Urquhart*..... 360
5. *Misjoinder of plaintiffs fatal.*—In detinue for a slave, by several remainder-men, tenants in common, after termination of precedent life

PLEADING AND PRACTICE AT LAW—CONTINUED.

- estate, if the wife, whose interest is vested in her husband, be joined as co-plaintiff with him, the misjoinder is fatal to the entire action.—Walker v. Fenner. 367
6. *Practice prescribed in applications for re-hearing after final judgment in action at law, under Code (§§ 2407-2417).*—Pratt & McKenzie v. Keils & Sylvester. 390
7. *Amendment of complaint by change of plaintiffs.*—Where an action of trover is brought in the name of the assignor, for the use of the assignee for the benefit of creditors, and the evidence shows that the conversion took place after the assignment, the complaint cannot be amended so as to authorize a recovery.—Stodder v. Grant & Nickels. 416
8. *Defective service of process not available on error.*—The sheriff's failure to serve a copy of the complaint with the summons is a mere irregularity, which, after judgment by default, is not available on error.—Dew v. Cunningham. 466
9. *Overruling demurrer to several pleas of which one is good.*—Where a demurrer to several pleas, each going to the whole declaration, is overruled, and the plaintiff declines to reply, the judgment on the demurrer will not be reversed on error, if any one of the pleas is good, since the erroneous overruling of the demurrer to the others could not have prejudiced the plaintiff.—Jesse v. Cater. 475
10. *Plea averring arbitration and award.*—In an action on an injunction bond where the matters in controversy in the injunction suit were submitted to arbitration, and the arbitrators awarded that certain acts should be done by the parties concurrently, a plea setting up the submission and award must aver performance on the part of the pleader, or an offer to perform, or a good and legal excuse for the omission to do either. . . . 475
11. *When office judgment for want of plea may be entered.*—Under the provisions of the Code, in connection with the rules of practice in the circuit courts, (Code, §§ 2258-60 ; App. 714, 9th and 10th rules,) if the defendant fails to plead within the prescribed time, the plaintiff may have the default entered on the docket in vacation, at any time before pleas are filed, and claim the benefit thereof at the ensuing term of the court ; but the defendant may plead at any time before the default is entered against him.—Woolsey v. M. & C. Railroad Co. 536
12. *What is sufficient entry of office judgment.*—An entry on the docket, in vacation, after the time for pleading has expired, in these words, "Plaintiff claims judgment against defendant for want of a plea," signed by the plaintiff's attorneys, with the date attached, and attested by the clerk, is not a sufficient entry of the default ; nor is it sufficient to sustain a judgment by default at the ensuing term, after pleas are filed, although proof is made to the court that no pleas were filed when it was entered. 536
13. *Rendition of judgment for costs against surety on claim bond.*—The rendition of a joint judgment for costs against the claimant and his surety on the claim bond, even if erroneous, is not prejudicial to the claimant, and for that reason is not available on error.—Irons v. Reynolds. 305
14. *Plea of title before suit brought in detinue.*—In detinue for a slave, a plea which only shows that the title was in the defendant on a specified

PLEADING AND PRACTICE AT LAW—CONTINUED.

- day before the commencement of the action, is bad on demurrer.—
Patton v. Hamner..... 618
15. *Demurrer visited on first defective pleading*.—Where there is a defective replication to a defective plea, a demurrer to the replication should be visited on the plea..... 618
16. *Demurrer to evidence, object and effect of*.—The object of a demurrer to evidence is not to substitute the judge for the jury as a trier of the facts, but to ascertain the law upon an admitted state of facts; and its effect, when issue is joined, is to admit every fact which the testimony establishes, or tends to establish: the court does not stand in the place of a jury, to render such a judgment as the jury ought to have rendered, but to render a judgment against the party demurring, if the jury could legally have done so from the evidence.—*Shaw v. White*..... 637
17. *Joinder in demurrer to evidence, when court may require*.—Where the evidence introduced by the plaintiff does not tend to establish his right to recover, and the defendant introduces no evidence, but demurs to the plaintiff's, the court is authorized (Code, § 2349) to require the plaintiff to join in the demurrer..... 637
- See RULES OF PRACTICE, p. 8.

PLEADING AND PRACTICE IN CHANCERY.

1. *Using bill in chancery as evidence in another cause*.—When a bill in chancery is offered in evidence, in another suit, as an admission of the complainant, it is governed by the same rules that apply to all other admissions; and consequently he cannot use his amended bill as rebutting evidence against the original.—*Pearsall v. McCartney*..... 110
2. *How non-resident infant defendants may be made parties*.—Non-resident infant defendants, whose father is dead, and whose mother is a non-resident, may be made parties to a bill by publication and sending a copy of the order to their mother, with whom they live, at her known place of residence; but sending a copy of the order to *Elizabeth Lewis*, "as the mother of said infants," when their mother's name is shown by the record to be *Mary A. Lewis*, is not a compliance with the rule.—*Clark v. Gilmer*..... 265
3. *Decree reversed for error prejudicial to infant defendants*.—When non-resident infant defendants are not properly brought in as parties, the decree will be reversed by the appellate court, and the cause remanded, although the error escaped the notice of the solicitors and chancellor in the court below, and was not specially assigned as error..... 265
4. *As to misjoinder of complainants, and waiver of rights by joining in bill*.—Where an administrator and the surviving sister of his intestate, as tenants in common, join in a bill for the recovery of slaves bequeathed by the maternal grandfather of the sisters to their mother and her children, and sold under execution against their father, the surviving sister thereby waives her right of survivorship, if any she had; and the defendant cannot raise the objection, that the will created a joint tenancy, and that therefore there was a misjoinder of complainants.—*Hair v. Avery*..... 267

PLEADING AND PRACTICE IN CHANCERY—CONTINUED.

5. *Specific performance of parol contract*—Burthen of proof as to character of possession.—Where the bill alleges possession under the parol contract of sale, and the answer admits the possession, but alleges that it was acquired and held under a contract of rent, and denies the alleged contract of sale, the burthen of proof is on the complainant to prove the character of the possession.—*Danforth v. Laney* 274
6. *Evasive answer, as to facts within personal knowledge, equivalent to admission*.—Where material facts are stated in the bill, which, *prima facie*, are within the knowledge, information, or belief of the defendant, his failure to deny them, or to express his belief of their falsity, or to state that he cannot form any belief respecting their truth, is a virtual admission that they are true. He cannot shelter himself behind equivocal, evasive, or doubtful terms, nor behind a literal denial which amounts to no more than a negative pregnant.—*Grady v. Robinson* . . . 289
7. *Proof confined to facts in issue*.—The defendant cannot be permitted to prove, in bar of the relief sought by the bill, a fact which he failed to put in issue in his answer 289
8. *Motion to suppress depositions for defects in commissioner's return*.—A commissioner, appointed to take the deposition of a witness in a chancery cause, has power to administer the necessary oath, and to make a return to the court under whose authority he acts; and where his return embraces the commission, the interrogatories, the caption of the answers, and the certificate, all these together must be looked to in determining whether he performed his duty. A defect in one part of the return, when supplied in another part, is no ground for suppressing the deposition. If the return states that the deposition was taken pursuant to the commission, it is not essential that it should also state the manner of pursuing the commission. If it states that the witness was "sworn and examined" by the commissioner, "by virtue of a commission" issued out of the court to which the return is made; and the commission and interrogatories returned specified the particular case; and the deposition shows that the witness, at the time he was answering the interrogatories, knew that he was testifying in that particular case,—the presumption is, that the commissioner swore the witness by virtue of that commission, and in the case therein specified.—*King v. King* 315
9. *Feme covert, how made defendant to bill*.—When a married woman, a resident of this State, is named as a defendant to a bill, together with her husband and others, and there is no service of subpoena on her husband, as required by the 4th rule of chancery practice, no plea, answer, or demurrer filed by her and her husband, or by either of them, and no order that she might answer or defend separately, or that she might appear by solicitor or in any other manner,—publication against her as a non-resident, and her appearance by solicitor, do not give the court jurisdiction of her person, and the decree is not binding on her. *Boykin v. Rain* 332
10. *Proof without allegations*.—No decree can be rendered on proof which is not applicable to any of the allegations of the bill.—*Machem v. Machem* 374

PLEADING AND PRACTICE IN CHANCERY—CONTINUED.

11. *Variance between allegations and proof.*—In a bill for specific performance, the failure to prove an alleged stipulation of the contract which the law implies is no variance; as where the bill alleges an agreement by the husband to settle property on the wife, *for her sole and separate use*, and the evidence fails to show the *exclusiveness* of the promised gift.—*Andrews v. Andrews*. 432
12. *Burthen of proof as to negative averment.*—Where the bill alleges a negative, *e. g.* that complainant had no notice of the assignment of a note against which he seeks to establish an equitable set-off, and the answer avers notice, the burthen of proving notice is on the defendant, and not on the complainant to disprove it.—*Carroll v. Malone*. 521
13. *Exceptions to master's report.*—An exception to a master's report, in stating an account, is in the nature of a special demurrer, and must specify particularly the error complained of: if it is directed to a particular portion of the report, including several distinct items, and is bad in part, it may be overruled *in toto*.—*O'Reilly's Adm'r v. Brady*. . . 530
14. *Proper parties to bill to subject wife's separate estate to payment of charge.*—A bill which seeks to subject the separate estate of a married woman to the payment of a charge created by her during coverture, is properly filed against her and her husband; and if it asserts no liability against the husband, and no claim for which either husband or wife can be charged personally, and its frame is such that, if a decree cannot be rendered against the wife's separate estate, no relief whatever can be granted under it, there is no misjoinder of defendants.—*Walker and Wife v. Smith*. 569
15. *Misjoinder of causes of action.*—When the separate estate of a married woman is liable in equity for the hire of a slave under an express contract, and also for reimbursement of jail fees necessarily paid by the owner, after the expiration of the term of hiring, to regain the possession of his slaves, who had been committed to jail as runaways during the term, the two demands may be joined in one bill. 569
16. *Waiver of objection by failing to raise it in primary court.*—Where the defendants file an answer, embracing a demurrer on several distinct grounds, they cannot afterwards raise in the appellate court, for the first time, an objection to the prayer of the bill, which, if it had been raised before the chancellor, might have been remedied by an amendment. 569
17. *Service of subpoena on wife.*—Where a subpoena is issued against husband and wife, and is returned by the proper officer "executed" generally, the service on the wife is sufficient. 569
18. *Proper parties to bill of revivor in foreclosure suit.*—In a suit for the foreclosure of a mortgage, if the mortgagor dies before the rendition of the final decree, and his will is admitted to probate by the court having jurisdiction, his heirs-at-law, as well as his personal representatives and devisees, are proper parties to the bill of revivor, and the complainant proceeds without them at his peril, since they have the statutory right to impeach the probate of the will, by bill in chancery, at any time within five years.—*Hunt and Frowner v. Acre and Johnson*. . 580
19. *Variance between allegations and proof.*—The rule which requires a corre-

PLEADING AND PRACTICE IN CHANCERY—CONTINUED.

- spondence between the allegations and proof, is especially strict in cases for specific execution of parol contracts for the sale of land. Where the contract alleged was, that the complainant should execute his note for one half of the purchase money of two lots bought by defendant, that the two lots should be equally divided between them by an east and west line, and that each party should immediately enter into possession of his half; while the contract proved contained the additional stipulation, "that whenever either of them wished to sell, the other should have the preference or refusal"; *held*, that the variance was fatal to relief.—*Williams v. Barnes*. 613
20. *Amendment not allowable, on reversal of decree, when it makes new case.*—In reversing a decree for the specific performance of a parol contract, on account of a fatal variance between the pleadings and proof, although the evidence shows that the complainant has a good cause of action, the appellate court will not remand the cause in order that the bill may be amended, if the amendment required would make a new case; but will dismiss the bill, without prejudice to the right to file another. 613
21. *Costs.*—The chancellor's decree in this case being reversed, and the bill dismissed, but without prejudice, on account of a variance between the allegations and proof, the costs were equally divided. 613
22. *When bill for discovery merely may be dismissed with costs.*—If a defendant in an action at law files a bill in equity for a discovery merely, in aid of his defense, without first making application to the plaintiff for an admission of the facts sought to be elicited, and the answer denies some of the facts alleged, the bill may be dismissed, with costs; and if the action at law is brought in the name of one person, for the use of another, it is not sufficient to allege an application to the nominal plaintiff, and his refusal, to admit the facts as to which the discovery is sought.—*Drake v. Foster*. 649
- See RULES OF PRACTICE, p. 8.

PRESUMPTIONS.

1. *Presumption contra spoliatorem.*—A husband, in resisting the probate of his wife's will, can derive no advantage from any obscurity or uncertainty in the secondary evidence adduced of the contents of an ante-nuptial agreement between him and his wife, when the paper produced by him, on notice, is materially different from that to which the witnesses depose, and there is evidence of his declaration that he had burned the marriage contract. The maxim, *omnia presumuntur contra spoliatorem*, applies with full force against him.—*Wells v. Bransford*. 200
2. *Presumption in favor of judgment.*—In a suit on a promissory note, where the record shows a judgment on verdict for the plaintiff, while it appears from the bill of exceptions that the defendant pleaded the statute of limitations, that evidence of a subsequent promise was introduced, and that a charge was asked by the defendant predicated on that evidence, it will be presumed, on error, that a replication was filed, and that an issue was before the jury to which the evidence and the charge were applicable.—*Bettis v. Saint*. 214
3. *Presumption of conveyance from long-continued possession.*—Where de-

PRESUMPTIONS—CONTINUED.

- defendant shows a letter from plaintiff's ancestor to an agent, directing him to close a bargain for the sale of the land, a deed thereupon executed by the agent, in his own name, to defendant's vendor, and an uninterrupted possession of twenty-eight years; the court may instruct the jury, that they may presume a conveyance from plaintiff's ancestor, either to the agent, or to his vendee.—*Harvey and Wife v. Thorpe*. . . . 250
4. *Presumption that settlement on wife was intended for her sole and separate use*.—Where the husband agrees to settle property on his wife, the law implies that it was intended for her sole and separate use.—*Andrews v. Andrews*. 432
5. *Presumption in favor of judgment*.—When the bill of exceptions professes to set out all the evidence, it cannot be presumed on error, in favor of the correctness of a charge given, that a fact was proved which is not found in the record.—*Lawler v. Norris*. 675
6. *Presumption in favor of judgment*.—Where a decree of the probate court, which is free from error on its face, does not appear on its face, and is not shown by bill of exceptions, to be based on an account which is copied into the transcript, the appellate court will not indulge the presumption that it was founded on that account, and on that presumption reverse it.—*Williams v. Gunter*. 682

PROBATE COURT.

1. *Jurisdiction over ademption of legacies*.—Although there may be cases, involving equitable circumstances, which the probate court, from its peculiar organization and mode of procedure, would be incompetent fully to adjust; yet it has jurisdiction over the ademption of legacies, as incident to the settlement and distribution of estates.—*May's Heirs v. May's Adm'r*. 141
2. *Jurisdiction to order sale of land for payment of debts*.—The jurisdiction of the orphans' court to order the sale of an intestate's real estate for the payment of debts, under the act of 1822 (*Aikin's Digest*, 180, § 16), affirmatively appears, in a collateral proceeding, when the record shows a petition by the administrator, alleging a deficiency of personal assets for the payment of debts, and asking an order to sell the real estate, and that the court acted on the petition and granted the order of sale.—*Doe d. Saltonstall and Wife v. Riley and Dawson*. . . . 164
3. *When recitals in decree may be looked to*.—Although recitals in the decrees of courts of limited jurisdiction cannot give jurisdiction; yet, where the jurisdiction otherwise appears, the decree may be looked to for the purpose of ascertaining whether the action of the court, in ordering a sale of lands, was predicated upon the two petitions separately shown in the record, or whether, as might have been done, one was regarded as amendatory of the other, and the two considered as but one application. 164
4. *Jurisdiction to order sale of land for purpose of distribution*.—The jurisdiction of the orphans' court to order a sale of an intestate's real estate for the purpose of distribution, under the act of 1822 (*Clay's Digest*, 224, § 16), attaches on the filing of the petition by the administrator, alleging that the real estate "cannot be equally, fairly, and beneficially

PROBATE COURT—CONTINUED.

- divided" without a sale, and its recognition by the court in granting the order of sale; the failure to state in the petition which of the heirs are of full age, is not a jurisdictional fact.—*Field's Heirs v. Goldsby*... 218
5. *Conclusiveness of proceedings had under such order of sale.*—The failure to issue a citation to the resident heirs, or to make publication as to the non-residents, the failure of the guardian of the infant defendants to deny the allegations of the petition, and the want of proof by deposition of the existence of the alleged ground of sale,—are mere irregularities, which, although they might be sufficient to reverse the proceedings on error, have no weight in a collateral attack..... 218.
6. *Failure to give notice of time and place of sale.*—The provisions of the act of 1806 (Clay's Digest, 225, § 24), requiring an executor or administrator to give notice of the time and place of sale, do not apply to sales made by the commissioners under the act of 1822, the ratification of which by the court is the test of correctness in complying with the order of sale..... 218

RAILROADS.

1. *Right of way assignable by railroad company.*—The Montgomery Railroad Company having made an assignment of its roads and all its effects, which was held valid by this court in *Allen v. Montgomery Railroad Co.*, 11 Ala. 437, the purchasers at the trustees' sale, who were afterwards incorporated under a new name, acquired and succeeded to all the rights which the old company had under a deed conveying the right of way for the construction of the road.—*Pollard v. Maddox*.... 321

REHEARING AT LAW.

1. *Validity of defense to original action not necessary to be proved on trial of petition for re-hearing.*—A petition for a re-hearing (Code, §§ 2407, 2417) after final judgment in an action at law, on the ground of "surprise, accident, mistake, or fraud," by which the defendant was deprived of the benefit of his defense to the original action, is a new action, on the trial of which it is only necessary for the defendant to prove the truth of the facts which constitute the alleged surprise, accident, mistake, or fraud: where the pleas filed to the original action are legally sufficient, he is not required to prove that they are true, or that the defense set up in them ought to prevail.—*Pratt & McKenzie v. Keils & Sylvester*..... 390
2. *Judgment on petition.*—If the trial of the petition results adversely to the petitioner, he cannot have a re-hearing of the original cause; but if the trial results in his favor, the proper judgment is, that the judgment rendered in the original action be vacated, and the execution issued under it be quashed, that a re-hearing be granted in the original action, that the petitioner be let in to make his defense in that action, and that he recover of the plaintiff in that judgment the costs which have accrued on the petition for re-hearing..... 390
3. *Judgment corrected and affirmed at costs of appellant.*—Where the record shows that, after the expiration of the term at which final judgment was rendered, a petition for re-hearing under the statute was filed; that a motion was also made, at the ensuing term, to set aside and correct the entry of judgment; that exceptions were reserved to the rulings of the

REHEARING AT LAW—CONTINUED.

court on the hearing of the motion; and that the court rendered, as on the motion, such a judgment in substance as the petitioner was entitled to on his petition, from which judgment the opposite party appealed,—the judgment will be corrected, on error, at the costs of the appellant, and made to conform to the proper judgment on the petition. 390

RIGHT OF WAY.

See RAILROADS.

SALES, JUDICIAL.

1. *Conclusiveness of proceedings had under order of sale by orphans' court.*
Where the record affirmatively shows that the court had jurisdiction to order the sale, that the land was sold by commissioners under its order, that the sale was approved by the court, and that a deed was executed to the purchaser under its mandate, the action of the court, being in the nature of a proceeding *in rem*, is conclusive until vacated, and cannot, though abounding with errors and irregularities, be collaterally impeached.—*Doe d. Saltonstall and Wife v. Riley and Dawson*. 164
2. *Irregularities insufficient to invalidate sale.*—The failure to give the statutory notice by citation to the heirs, and the absence of proof by the record that the guardian *ad litem* of the minor heirs accepted the appointment, or that he filed an answer denying the allegations of the petition, or that the commissioners gave proper notice of the time and place of sale,—are mere irregularities, which might furnish good grounds of reversal on error, but which cannot invalidate the sale, when collaterally attacked, if the record affirmatively shows that the court had jurisdiction. 164
3. *Indefiniteness of description of land.—Admissibility of parol evidence to identify it.*—Indefiniteness and discrepancies in the description of the land, in the petition, order of sale, report of sale and commissioners' deed, will not invalidate the sale, when enough appears to show that the land sold and conveyed by the commissioners was comprehended in the description contained in the petition and order of sale; and when this is the case, parol evidence is admissible to fix the boundaries of the portion sold, according to the data furnished by the deed, so as to identify the land therein described. 164
4. *Conclusiveness of proceedings had under order of sale by probate court.*
The failure to issue a citation to the resident heirs, or to make publication as to the non-residents, the failure of the guardian of the infant defendants to deny the allegations of the petition, and the want of proof by deposition of the existence of the alleged ground of sale,—are mere irregularities, which, although they might be sufficient to reverse the proceedings on error, have no weight in a collateral attack.—*Field's Heirs v. Goldsby*. 218
5. *Failure to give notice of time and place of sale.*—The provisions of the act of 1806 (Clay's Digest, 225, § 24), requiring an executor or administrator to give notice of the time and place of sale, do not apply to sales made by commissioners under the act of 1822, the ratification of which by the court is the test of correctness in complying with the order of sale. 218

SEPARATE ESTATES OF MARRIED WOMEN.

See HUSBAND AND WIFE.

SET-OFF.

1. *Equitable set-off against assignee of bond.*—If a note under seal is assigned by endorsement after maturity, the assignee takes it subject to all equitable defenses existing in favor of the maker prior to notice of the assignment, whether they grow out of the same, or out of a different transaction. (WALKER, J., *dissenting*, held that, where the assignee acquired the legal title by endorsement, without notice of the maker's equity, he ought to be protected.)—Carroll v. Malone..... 521

SHERIFFS.

1. *Sheriff's duty in levying fi. fa.*—The sheriff is bound to pursue the mandate of an execution, unless otherwise instructed by the plaintiff, his attorney, or some one having an interest admitted by the plaintiff; and is not bound to determine the conflicting rights and interests which arise under an agreement, between the plaintiff in execution, under a former levy, and a statutory claimant, to the effect that a judgment of condemnation should be rendered for the agreed value of the property, and that the claimant, on paying this agreed value, should have the property: such an agreement does not, as against the sheriff, render void an *alias fi. fa.*—Patton v. Hamner..... 618
2. *Construction of statute regulating sheriff's fees.*—Under the Code (§§ 3042, 3047), a sheriff cannot, in any case, be entitled to a fee "for levying *fi. fa.* and making money thereon", and to another fee, under the same execution, "for levying *fi. fa.* when sale is stayed, after levy, by a restraining order." Where the restraining order stays the sale of only a portion of the property levied on, and leaves the sheriff free to sell the other portion, and to levy upon and sell any other property of the defendant found in his county, he is not entitled to a fee of "one per cent. on the amount of the judgment"; and if, after levy, the sale of a portion of the property is prevented by injunction, he is not entitled to any fee or commission from the complainant in the injunction suit.—Mastin v. Cullom & Co..... 670
3. *Sheriff's liability in trover for levy of valid attachment.*—The act of a sheriff, in taking the defendant's property under a valid attachment, cannot be converted into a tort, as against a prior fraudulent grantee of the defendant, by the mere fact that the attachment suit is afterwards dismissed by the plaintiff; nor is he guilty of a tortious conversion of the property, when it is taken out of his hands by his successor in office, under another attachment issued by the plaintiff on the same debt, immediately after the dismissal of the first; both attachments, therefore, with their levies, would be competent evidence for him, when sued in trover.—Houseman v. Stewart..... 684

SLAVES.

1. *Slave may be agent.*—A slave may act as the agent of his owner or hirer. Stanley v. Nelson..... 514
2. *Contract made with slave while suffered to go at large.*—If a slave, while per-

SLAVES—CONTINUED.

- mitted by his owner or hirer, contrary to the provisions of the act of 1805 (Clay's Digest, 541, § 12.) to go at large, and to act as a freeman, makes a contract for the hire of another slave to work with him, and a white man gives his note under seal for the hire, the note is void. . . . 514
3. *Appropriation by slave, while suffered to go at large, of proceeds of his labor.*—If a slave, while suffered by his owner or hirer to go at large and act as a freeman, appropriates the proceeds of his labor, with the consent of his owner or hirer, to the payment of a debt, the owner or hirer cannot afterwards reclaim them; and, *a fortiori*, a third person cannot afterwards claim to have them applied in payment of a liability incurred by him for the slave. . . . 514
4. *Liability of hirer of slave.*—If a slave runs away during the term of the hiring, and is committed to jail as a runaway, it is the duty of the hirer to pay the necessary jail fees; and if he refuses to do so, the owner, at the expiration of the term, may pay them, and thereby acquire a cause of action against him.—*Walker and Wife v. Smith*. . . . 569

SPECIFIC PERFORMANCE.

1. *What part performance avoids statute of frauds.*—Possession by the vendee, with the consent of the vendor, under a parol contract for the sale of land, takes the case out of the statute of frauds; but mere possession, when it is not shown to be under the contract, is not sufficient.—*Danforth v. Laney*. . . . 274
2. *Burthen of proof as to character of possession, in chancery.*—Where the bill alleges possession under the parol contract of sale, and the answer admits the possession, but alleges that it was acquired and held under a contract of rent, and denies the alleged contract of sale, the burthen of proof is on the complainant to prove the character of the possession. 274
3. *Variance between allegations and proof.*—In a bill for specific performance, the failure to prove an alleged stipulation of the contract which the law implies is no variance; as where the bill alleges an agreement by the husband to settle property on the wife, for her sole and separate use, and the evidence fails to show the *exclusiveness* of the promised gift.—*Andrews v. Andrews*. . . . 432
4. *Certainty requisite in contract.*—It was objected in this case, on the part of the defendant, that the uncertainty in the terms of the contract was an insuperable obstacle to its specific execution; but the court, while admitting that great certainty and precision in the averment and proof of contracts, whether verbal or written, were indispensable pre-requisites to their specific execution, held that, in view of the looseness and inaccuracy of language which showed that the parties and witnesses were uneducated, and construing the unartificial expressions of the parties by their subsequent declarations showing the meaning which they attached to the words, the terms of the contract were sufficiently certain. . . . 432
5. *Contract must be fair, just, and reasonable.*—It is an unquestioned doctrine of equity, that only those contracts which are fair, just, and reasonable, will be specifically executed. . . . 432
6. *Inadequacy of consideration.*—When the inadequacy of consideration shows

SPECIFIC PERFORMANCE—CONTINUED.

- that the contract is unfair, inequitable, or unconscionable, even though it might not be sufficient, if the contract were executed, to induce the court to rescind or set it aside, a specific performance will be refused. 432
7. *When equity will sustain and enforce post-nuptial voluntary settlement in favor of wife.*—Equity will sustain a post-nuptial voluntary settlement in favor of the wife, when executed, and will specifically enforce, as against any other person than the party himself, an agreement to make such a settlement; but it will not specifically execute such an agreement against the party himself, because, until executed, it is revocable. 432
8. *What consideration will sustain specific execution of agreement to make such settlement.*—Neither the moral obligation of the husband to provide for his wife, nor the fact that he received property by her, nor both these considerations together, will justify a specific execution of a post-nuptial agreement on his part to make a settlement on her; but when, super-added to these, there is a valuable consideration, irrevocably executed on the part of the wife, a specific performance will not be refused on account of the inadequacy of that consideration. In this case, the court decreed a specific performance of an agreement to settle on the wife slaves valued at more than \$4,000, in consideration of her relinquishment of dower in certain lands sold at \$2,600; it being also alleged and proved, that the husband received the slaves, with other property, by the wife, and that there were no children of the marriage to be provided for. 432
9. *When contracts concerning personalty will be specifically enforced.*—Generally, equity will not specifically enforce contracts concerning personal property, because there is a remedy at law in a suit for damages; but where there is no remedy at law, as in case of post-nuptial agreements between husband and wife, a specific performance may be decreed. 432

STATUTES, CONSTRUCTION OF.

1. *Arkansas statutes on subject of divorce construed.*—Thompson v. The State. 12
2. *When permissive words in statute will be construed imperative.*—The word *may*, when used in a statute, will be construed mandatory and imperative for the purpose of sustaining and enforcing rights, but not for the purpose of creating a right or determining its character.—*Per* Walker, J., while Rice, C. J., *held*, that a permissive word should be construed peremptory, when used to clothe a public officer with power to do an act which ought to be done for the sake of justice, or which concerns the public interest or the rights of third persons.—*Ex parte* Banks. 28
3. *Statute of 1854, requiring registration of names of steamboat owners, construed.* Commissioners of Pilotage v. Steamboats Cuba, Swan, and J. H. Bell. 185
4. *Statute providing for acknowledgments of deeds by femes covert, (Clay's Digest, 155, § 27,) construed.*—Boykin v. Rain. 332
4. *Computation of time under statute of non-claim.*—McHenry v. Wells. 451

STEAMBOATS.

1. *Construction of registration act.*—Under the act of February 15, 1854, (Pamphlet Acts 1853-4, p. 50,) "to provide for the registration of the names of steamboat owners," which imposes a penalty upon the owners of any steamboat, navigating the waters of this State, for a failure to file in

STEAMBOATS—CONTINUED.

- the proper office, "*before such boat leaves the port of Mobile,*" a written statement of the names and residences of her owners; *held*, that a steamboat, used exclusively as a lighter and tow-boat, which plied between the wharves of the city and the lower part of the bay outside the bar, carrying cargoes to and from large vessels which could not pass the bar, was within the statute, although she never went outside the limits of the port of Mobile.—*Commissioners of Pilotage v. Steamboats Cuba, Swan, and J. H. Bell*..... 185
2. *Limitation of suit for penalty against boat*.—The provision of the second section of this act, which gives a remedy against the steamboat by admiralty process "in the same manner as is provided by the laws of this State for the recovery for work and materials furnished steamboats," refers only to the form and mode of conducting the proceeding, but does not limit the suit to thirty days after the accrual of the cause of action. The limitation of the suit is one year, as prescribed by section 2481 of the Code..... 185
3. *Registration act not regulation of commerce*.—The act of February 15, 1854, "to provide for the registration of the names of steamboat owners," which requires a written statement of the names and residences of the owners of steamboats navigating the waters of this State to be filed in the probate court of Mobile, and imposes a penalty of \$500 for its violation, is not a regulation of commerce, within the constitutional grant of that power to Congress..... 185
4. *Nor in conflict with license laws of United States*.—The laws of the United States, regulating the coasting trade, do not confer rights, in the proper sense of that term, but rather impose restrictions on the trade; and the additional requisition of this State statute, as it does not obstruct or dispense with any of the requisitions of the acts of Congress, cannot be said to be in conflict with them..... 185
5. *Nor violative of ordinance of 1819, as imposing tax or duty*.—The requisition which this statute makes upon the owners of steamboats, is not a tax, duty, impost, or toll, within the ordinance of 1819, by which Alabama accepted the conditions of the act of Congress admitting her into the Union, and declared "that all navigable waters within the State shall forever remain public highways, free to the citizens of this State and of the United States, without any tax, duty, impost, or toll therefor, imposed by this State..... 185

SUPERSEDEAS.

1. *Amendment of petition allowable*.—A petition for *supersedeas*, which, under our practice, stands in lieu of a declaration, may be amended, by leave of the court, after demurrer sustained to the original, provided the amendment does not make an entirely different case as to the execution sought to be superseded.—*Pearsall v. McCartney*..... 110
2. *Right to open and conclude argument*.—The defendant in the judgment, who applies for the *supersedeas*, is the plaintiff in the proceedings subsequently had on his petition, and is therefore entitled to open and conclude the argument..... 110

SUPREME COURT.

1. *Appellate jurisdiction.*—The appellate jurisdiction of the supreme court, in the revision of final judgments and decrees of the inferior courts, is derived from the constitution, (Art. V, §§ 1 and 2,) and is not restricted by the statutory provisions regulating appeals: the appeal, bond, or security for costs, and certificate, required by the Code, (§§ 3016, 3041,) are not jurisdictional facts, but merely the prescribed means by which each particular case may be brought under the pre-existing jurisdiction of the court.—*Per Walker and Stone, JJ.*; while Rice, C. J., held, that, however full and complete might be the appellate jurisdiction conferred by the constitution, the public policy of the State, as disclosed and declared by the Code, required that that jurisdiction should not be exercised in favor of a party who did not comply with the requisitions of the statutes regulating appeals.—*Thompson v. Lea*. 453
- See RULES OF PRACTICE, p. 8.

TRESPASS.

1. *Liability of joint trespassers.*—In trespass against two, if the evidence authorizes exemplary damages against one, the other, if he is shown to have acted in concert with him, is liable to the same extent.—*Hair v. Little*: 236
2. *Measure of damages.*—In trespass for taking and carrying off slaves, the court charged the jury, “that, if they found for the plaintiffs, the measure of damages would be the highest value of the slaves at any time between the taking and the trial; that, in addition to this value, they might allow interest thereon, or might look to the value and hire as some guide in coming to a conclusion, but were not bound by them”: *Held*, that the charge was not erroneous 236
3. *Exemplary damages, when allowable.*—Exemplary damages, or “smart money”, may be allowed to the plaintiff, in trespass for taking and carrying away his goods, when there are circumstances of aggravation attending the trespass. 236

TRIAL OF RIGHT OF PROPERTY.

1. *Wife cannot interpose claim when legal title is in husband.*—If the husband purchase a slave in his own name, and take the bill of sale to himself, the legal title vests in him, although the purchase money was the proceeds of the sale of property in another State secured to the wife by ante-nuptial agreement there executed; and though he may deliver the slave to the wife, and recognize it as hers, yet she cannot interpose a claim at law, in her own name, when the slave is taken under attachment against the husband.—*Irons v. Reynolds*. 305
2. *Insolvency of defendant in execution, when admissible evidence, and how proved.* On a trial of the right of property in a slave, where the claimant derives title under a conveyance from the defendant in execution, which is attacked on the ground of fraud, the plaintiff may show that, at the time of the execution of the conveyance, the defendant in execution was insolvent; and evidence of notes outstanding against him at that

TRIAL OF RIGHT OF PROPERTY—CONTINUED.

- time, and of a judgment rendered on one of such notes, is admissible as tending to prove the fact of insolvency.—*Beeson v. Wiley, Banks & Co.* 575
3. *Error without injury in rendering judgment for costs against surety on claim bond.*—The rendition of a joint judgment for costs against the claimant and his surety on the claim bond, even if erroneous, is not prejudicial to the claimant, and for that reason is not available on error..... 575

TROVER AND CONVERSION.

1. *Absolute sale by bailee held conversion.*—An absolute sale of a slave, by one who has possession under a contract of hiring, does not transfer to his vendee the right to the unexpired term, but is a violation of the contract of hiring, and gives the owner the immediate right to take peaceable possession, if he can.—*Hair v. Little*..... 236
2. *Conversion by administrator no cause of action against estate.*—When an administrator is sued in his representative character, for an alleged conversion of a slave by his intestate, proof of his possession and employment of the slave at the commencement of the suit does not authorize a recovery against him, since the estate is not responsible for his acts.—*Shorter v. Urquhart*..... 360
3. *Amendment of complaint by change of plaintiffs.*—Where an action of trover is brought in the name of the assignor, for the use of the assignee for the benefit of creditors, and the evidence shows that the conversion took place after the assignment, the complaint cannot be amended so as to authorize a recovery.—*Stodder v. Grant & Nickels*.. 416
4. *Sheriff's liability in trover for levy of valid attachment.*—The act of a sheriff, in taking the defendant's property under a valid attachment, cannot be converted into a tort, as against a prior fraudulent grantee of the defendant, by the mere fact that the attachment suit is afterwards dismissed by the plaintiff; nor is he guilty of a tortious conversion of the property, when it is taken out of his hands by his successor in office, under another attachment issued by the plaintiff on the same debt, immediately after the dismissal of the first; both attachments, therefore, with their levies, would be competent evidence for him, when sued in trover.—*Houseman v. Stewart* 684

TRUSTS.

See CHANCERY, 1, 2, 4, 11, 12.

ESTOPPEL, 2.

DEEDS AND CONVEYANCES, 10.

USURY.

1. *Discounting note at illegal rate of interest is usury, and available as defense against assignee.*—Discounting a note on a third person, eleven months before its maturity, at four per cent. per month, and taking the endorsement of the holder, with a mortgage on his property to secure its payment, do not constitute a *bona fide* purchase of the note, but a usurious loan; and if the note and mortgage are then assigned to another person, at the same usurious rate of discount, and with notice of the usurious nature of the

USURY—CONTINUED.

- transaction, the mortgage is open in his hands to the defense of usury.
 Hunt and Frowner v. Acre and Johnson..... 580
2. *When legal interest must be paid on usurious loan.*—If a debtor comes into equity, for relief against a judgment at law, or other legal security, on the ground of usury, where he has by his own voluntary act deprived himself of the opportunity to appear and plead the usury in the character of defendant, he is required to pay principal and legal interest; but this rule does not apply, in the absence of such voluntary act, where the heirs of the mortgagor come into equity to redeem the mortgaged premises, to set aside a decree of foreclosure, which was obtained by the creditor in a suit so conducted as to deprive them of the opportunity to appear and plead the usury, and to remove the cloud on their title created by the proceedings in the foreclosure suit.—(WALKER, J., *dissenting.*)..... 580
3. *Usury a defense to suit for foreclosure of mortgage.*—Usury in the transaction in which the mortgage had its origin, may be set up as a defense, *pro tanto*, to a bill for foreclosure; and its effect, if established, is to discharge the party from the payment of any interest whatever on the debt.... 580

VARIANCE.

See EVIDENCE, 7, 8, 9, 10.

PLEADING AND PRACTICE IN CHANCERY, 11, 19.

VENDOR AND VENDEE.

See FRAUD, 3, 4.

CHANCERY, 8, 9, 10, 20.

VENUE.

See CRIMINAL LAW, 9, 11, 12.

VERDICT.

See CRIMINAL LAW, 21.

WARRANTY.

1. *Warranty in bill of sale of slave construed.*—In a bill of sale of a slave, the words, "which said negro I do warrant and defend unto him, the said L., his heirs and assigns forever," are a warranty both of soundness and title.—Livingston v. Arrington..... 424
2. *General warranty of soundness covers what defects.*—A general warranty of soundness does not cover visible and external defects, which are plain and obvious to the purchaser,—such as the eye can discover and enable him to comprehend; but it covers all other defects, even though the purchaser is informed of their nature, character, and extent. 424

WILLS.

1. *What is undue influence.*—Undue influence, such as will vitiate a will, must in some degree destroy the testator's free agency, and constrain him to do that which is against his will, but which he is unable to refuse, or too weak to resist; it is not enough that the testator's own

WILLS—CONTINUED.

- misconduct may have brought about a condition of things, which, operating as a moral inducement on his mind, may cause him to make a disposition of his property which, under other circumstances, he might not have made.—*Dunlap v. Robinson*..... 100
2. *Provision by will for illegitimate children not void*.—There is no rule of law, and no reason founded either in morals or public policy, which prohibits an unmarried man from making provision by will for his illegitimate children 100
3. *Burthen of proof on trial of issue to test validity of will*.—On the trial of an issue to test the validity of a will, the *onus* is on the proponent to show the testator's capacity and the due execution of the will; and when these facts are established, it then devolves on the contestants to show fraud or undue influence..... 100
4. *Jurisdiction of probate court over ademption of legacies*.—Although there may be cases, involving equitable circumstances, which the probate court, from its peculiar organization and mode of procedure, would be incompetent fully to adjust; yet it has jurisdiction over the ademption of legacies, as incident to the settlement and distribution of estates.—*May's Heirs v. May's Adm'r*..... 141
5. *Admissibility of parol evidence to show whether advancement was intended as satisfaction of provision by will*.—It is now well settled that parol evidence is admissible to show that a subsequent advancement by the testator was not intended as a satisfaction, in whole or in part, of a previous provision by will; and whenever such evidence is admitted for this purpose, it may be rebutted by similar evidence.... 141
6. *Ademption of legacies by subsequent advancement*.—Testator, after providing for the payment of his debts, directed that "the entire residue" of his property, consisting of lands, slaves, and other property, should be equally divided among his wife and children, and declared that it was his "settled purpose" to make them all equally interested in his estate. The share of his only married daughter he directed should be divided between her and her husband, one half being secured to her as her separate estate, and the other half vesting absolutely in her husband. Afterwards he made advancements, consisting of lands, slaves, and other property, approximating in value the share which each would take under the will, to this daughter, another daughter then married, and his eldest son, who were the children of his first wife; and there was parol evidence (by two witnesses) of his subsequent declarations that this was independent of the provision made for them by will, that most of his property had come by their mother, and that he felt it his duty to give them more than his other children. *Held*, that the advancements were a satisfaction, *pro tanto*, of the provisions by will..... 141
7. *Wife's right to dispose by will of her separate estate*.—Where there is an agreement between husband and wife, before marriage, that she shall have either the whole or a particular part of her personal property to her separate use, she may dispose of it by will, without the consent of her husband.—*Wells v. Bransford*..... 200
8. *Instrument held a deed, and not a will*.—A writing under seal, in

WILLS—CONTINUED.

- form a deed, by which a father, in consideration of natural love and affection, conveyed to his daughter and her children, by present words of gift, several negroes and other personal property, contained this clause, "The condition of the above-named gift is to take place at my death; until then, the property is to remain as my own": *Held*, that the instrument was a deed, and not a will.—*Elmore v. Mustin*..... 309
9. *Construction of will*.—The will which was construed in *Machem v. Machem*, 15 Ala. 373, again examined, in a suit between the same parties, and the former construction adhered to.—*Machem v. Machem*.... 374
10. *Reformation of will in equity*.—A will cannot be reformed in equity, so as to make it create a separate estate in a married woman, on proof of an agreement, prior to her marriage, between the testator, who was her father, and her intended husband, that the will of the former should exclude the husband's marital rights..... 374
11. *Admissibility of parol evidence in construing will*.—In construing a will, it is permissible to look at the condition of the testator's family.—*Travis v. Morrison and Wife*..... 494
12. *Bequests construed, and held contingent*.—Testator directed his executors to keep together the entire estate, to cultivate the plantation with the slaves; and to apply the proceeds of the crops to the support of his family and the education of his children, and gave them power to sell property, and to manage the estate as they thought would be most conducive to the interests of the estate. The will contained, in addition to a specific bequest of three slaves to one daughter, the following clauses: "It is my further will and desire, that in the event of the marriage of my wife, or of either of my daughters, or of the child with which my wife is now pregnant, or of either of my children arriving at the age of twenty-one years, then my said executors shall have a division of all my property, both real and personal, and of whatever kind it may consist, and assign and give to my said wife, or my said children, when they shall marry or arrive at age as aforesaid, a child's part of said estate, which I give to them and their heirs forever." "In explanation of the foregoing bequest as to my plantation, it is my will and desire, that in the event of my wife's marriage, or of the marriage of any one of my children, or of any one of them arriving at age as aforesaid, that my property be then equally divided among them, giving each one, as before stated, a child's part of the same, and that the plantation be still managed and kept up by my said executors, for the benefit of my other children." The testator's family consisted of his wife and two daughters, one of whom was born of a former marriage. *Held*, that the legacies were contingent, and that therefore only those legatees who were living at the happening of the contingency on which the division was to take place were entitled to a share in the estate..... 494
13. *Decree in chancery annulling probate of will, conclusiveness and effect of*.—A bill in chancery to set aside and annul the probate of a will is in the nature of a proceeding *in rem*, to which any person having an interest may make himself a party; and the decree, annulling the probate, is final and conclusive, as to the validity of the will, in all courts and

WILLS—CONTINUED.

upon all persons, until set aside or reversed in some direct proceeding.

Hunt and Frowner v. Acre and Johnson..... 580

WITNESS.

1. *Mode of impeaching witness.*—In impeaching a witness, the inquiry is not limited to his general character for truth, but the impeaching witness may be asked as to his general character; STONE, J., *dissenting*. Ward v. The State 53
2. *Competency of impeaching witness.*—A witness who states that he is acquainted with the general character of the impeached witness, although he may never have heard it canvassed, is competent to testify in reference to it 53
3. *Objection to competency of witness, when raised.*—An objection to the competency of a witness on the ground of interest, when known at the time of filing cross-interrogatories, must be distinctly made before the witness is examined.—Hair v. Little 236
4. *Same.*—Or at first opportunity.—Drake v. Foster 649
5. *Husband incompetent witness for wife.*—The rule which renders husband and wife, unless in a few excepted cases, incompetent to testify for or against each other, has its foundation not only in the identity of their rights, but in a wise public policy; and there is nothing in any of the statutes of this State, securing to married women their separate estates, which requires that an exception should be made of cases in which the husband is called upon to testify to his acts in the capacity of trustee for his wife.—Wilson v. Sheppard 623

ERRATA.

In Thompson v. The State, page 18, top line, for "*amity*," read "*comity*."
 In Ward v. The State, page 61, eighteenth line, for "*authentically*," read "*authoritatively*."

In same case, page 63, fifth line from bottom, for "*numbers*," read "*members*."

In Martin and Flinn v. The State, page 72, fifth head-note, for "*with corroborating evidence*," read "*without corroborating evidence*."

Errors in spelling and punctuation, which are unavoidable, require no particular notice.

UC SOUTHERN REGIONAL LIBRARY FACILITY



A 001 167 767 1

